UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-97-25-A

Date: 17 September 2003

English

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IN THE APPEALS CHAMBER

Before: **Judge Claude Jorda, Presiding**
Judge Wolfgang Schomburg
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Carmel Agius

Registrar: **Mr. Hans Holthuis**

Judgement of: **17 September 2003**

PROSECUTOR

v.

MILORAD KRNOJELAC

JUDGEMENT

The Office of the Prosecutor:
Mr Christopher Staker
Ms Helen Brady
Mr Anthony Carmona
Ms Norul Rashid

Defence Counsel:
Mr Mihajlo Bakrač
Mr Miroslav Vasić

PURL: https://www.legal-tools.org/doc/46d2e5/

I. INTRODUCTION **6**

II. APPLICABLE LAW **8**

A. APPLICABLE CRITERIA FOR REVIEWING THE ALLEGED ERRORS 8
1. Issues of general importance 8
2. Applicable review criteria of the allegations of errors in general and the errors of fact in particular 9
3. Admissibility of the grounds of appeal presented by the parties 12
B. LAW APPLICABLE TO THE JOINT CRIMINAL ENTERPRISE AND AIDING AND ABETTING. 16
1. Joint criminal enterprise 16
2. Differences between participating in the joint criminal enterprise as a co-perpetrator and aiding and abetting 20

III. KRNOJELAC'S APPEAL **21**

A. KRNOJELAC'S SECOND GROUND OF APPEAL: AIDING AND ABETTING PERSECUTION (IMPRISONMENT AND LIVING CONDITIONS) 21
1. First sub-ground: Krnojelac's acts or omissions and their significance for the commission of the crime of persecution based on imprisonment and living conditions 21
(a) Imprisonment 22
(b) Living conditions 23
2. Second sub-ground: Krnojelac's awareness that, by his acts or omissions, he was contributing significantly to the underlying crimes committed by the principal offenders (persecution based on imprisonment and living conditions) and his knowledge of the offenders' discriminatory intent 25
(a) Imprisonment 25
(b) Living conditions 25
3. Third sub-ground: the *mens rea* of the aider and abettor in an act of persecution 26
B. KRNOJELAC'S FIFTH GROUND OF APPEAL: SUPERIOR RESPONSIBILITY FOR THE BEATINGS INFLICTED ON DETAINEES 27
1. Beatings inflicted on Ekrem Zeković 28
2. Krnojelac knew that beatings were taking place 29
3. Visible traces of beatings on the detainees 29

IV. THE PROSECUTION'S APPEAL **31**

A. THE PROSECUTION'S FIRST GROUND OF APPEAL: DEFINITION OF PARTICIPATION IN A JOINT CRIMINAL ENTERPRISE AND ITS APPLICATION IN THIS INSTANCE 31
1. Alleged errors of law in the definition of participation in a joint criminal enterprise 31
(a) Identification of a third category of "participant" 31
(b) Erroneous conflation of the first two categories of joint criminal enterprise 35
(c) Scope of the common state of mind and required additional agreement 37
(i) Did the Trial Chamber err in law by partitioning the different types of crimes which form the joint criminal enterprise? 39
(ii) Did the Trial Chamber err in law by requiring proof of an agreement between Krnojelac and the principal perpetrators of the crimes in question? .. 42
2. Application of the law to the facts in this case 43

PURL: https://www.legal-tools.org/doc/46d2e5/

(a) Allegation that the Trial Chamber made an erroneous finding with respect to the crime of imprisonment 44
(b) Erroneous application of the intent criterion to the second category of joint criminal enterprise 45
3. Issue of general importance 50
B. THE PROSECUTION'S SECOND GROUND OF APPEAL: THE FORM OF THE INDICTMENT . 53
C. THE PROSECUTION'S THIRD AND FOURTH GROUNDS OF APPEAL: ERRORS RELATING TO THE *MENS REA* OF SUPERIOR RESPONSIBILITY UNDER ARTICLE 7(3) OF THE STATUTE 59
1. Third ground of appeal: error in the Trial Chamber's findings of fact regarding the acts of torture committed at the KP Dom 63
(a) Findings related to the context in which the beatings were committed and the widespread nature of these beatings 65
(b) Findings related to Krnojelac's jurisdiction over his subordinates as prison warden 67
(c) Findings related to the interrogations, their frequency and the punishment inflicted upon the detainees 67
2. Fourth ground of appeal: error in the Trial Chamber's findings of fact regarding the murders committed at the KP Dom 73
D. THE PROSECUTION'S FIFTH GROUND OF APPEAL: THE TRIAL CHAMBER COMMITTED AN ERROR OF FACT WHEN IT FOUND THAT THE BEATINGS CONSTITUTING INHUMANE ACTS AND CRUEL TREATMENT WERE NOT INFLICTED ON DISCRIMINATORY GROUNDS AND THAT KRNOJELAC COULD NOT THEREFORE BE HELD RESPONSIBLE FOR PERSECUTION AS A SUPERIOR.... 78
F. THE PROSECUTION'S SIXTH GROUND OF APPEAL: THE TRIAL CHAMBER ERRED IN ACQUITTING KRNOJELAC ON THE COUNT OF PERSECUTION (FORCED LABOUR).... 83
1. There was sufficient evidence that the labour was involuntary and to establish involuntary labour as a form of persecution.... 83
(a) The Trial Chamber erred in finding that there was insufficient evidence that the labour was involuntary 83
(b) If forced labour is established, the Trial Chamber's findings are sufficient to warrant Krnojelac's conviction for persecution based on forced labour....89
2. The Trial Chamber erred in holding that Krnojelac was not individually responsible under Article 7(1) of the Statute 91
G. THE PROSECUTION'S SEVENTH GROUND OF APPEAL: PERSECUTION BY WAY OF DEPORTATION AND EXPULSION.... 93
1. Persecution by way of deportation and expulsion 93
(a) The Prosecution's allegation of persecution....94
(b) Acts of displacement that can be characterised as persecution (a crime against humanity) 96
2. Exercise of genuine choice 100
3. Discriminatory nature of the displacements 103
4. Krnojelac's responsibility 104

V. SENTENCE 108

VI. DISPOSITION.... 113

SEPARATE OPINION OF JUDGE SCHOMBURG.... 1

PURL: https://www.legal-tools.org/doc/46d2e5/

SEPARATE OPINION OF JUDGE SHAHABUDDEEN 1

ANNEX A: GLOSSARY 126

A. APPEAL 126
1. Parties' written submissions 126
2. References used in this case.. 126
B. CASE-LAW CITED.. 128
C. OTHER REFERENCES 131

ANNEX B: PROCEDURAL BACKGROUND 133

PURL: https://www.legal-tools.org/doc/46d2e5/

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal" or "Tribunal") is seised of appeals in relation to the Judgment rendered by Trial Chamber II on 15 March 2002 in the case *The Prosecutor v Milorad Krnojelac* ("Judgment").[1]

Having considered the written and oral submissions of the parties, the Appeals Chamber,

HEREBY RENDERS ITS JUDGEMENT.

[1] *The Prosecutor v. Milorad Krnojelac*, case no. IT-97-25-T, Trial Chamber, 15 March 2002, ("Judgment"). For a list of the main designations and abbreviations used in this Judgement, see Annex A.

PURL: https://www.legal-tools.org/doc/46d2e5/

I. INTRODUCTION

1. The Indictment of 25 June 2001 charged Milorad Krnojelac ("Krnojelac") with twelve counts of crimes against humanity and violations of the laws or customs of war. As commander of the Foča Kazneno-Popravni Dom ("KP Dom") from April 1992 to August 1993, Krnojelac was charged under Articles 7(1) and 7(3) of the Statute with acting together and in common purpose with the KP Dom guards in order to persecute Muslim and other non-Serb civilian detainees on political, racial or religious grounds, commit acts of torture, beatings and murder, and illegally detain non-Serb civilians. In the Judgment, the Trial Chamber found Krnojelac individually responsible as an aider and abettor under Article 7(1) of the Statute for the crime of persecution (based on imprisonment, living conditions and beatings) as a crime against humanity (count 1) and the crime of cruel treatment (based on living conditions) as a violation of the laws or customs of war (count 15). Under Article 7(3) of the Statute, Krnojelac was also held responsible for the crimes of persecution as a crime against humanity (based on beatings - count 1), inhumane acts as a crime against humanity (based on beatings - count 5) and cruel treatment as a violation of the laws or customs of war (based on beatings - count 7). He was acquitted by the Trial Chamber on the counts of torture, murder under Article 3, murder under Article 5, imprisonment and other inhumane acts and handed down a single sentence of seven-and-a-half years' imprisonment.

2. On 12 April 2002, Krnojelac appealed against those convictions and raised six grounds in support of his appeal. Krnojelac maintains that the Trial Chamber erred in fact by misevaluating his position as prison warden.[2] In his view, the Trial Chamber committed an error of law in holding that Krnojelac aided and abetted persecution (imprisonment and living conditions). He contends that the Trial Chamber committed an error of fact in finding that Krnojelac aided and abetted cruel treatment (living conditions). It is further claimed that the Trial Chamber erred in fact by ruling that Krnojelac was responsible as a superior for persecution (beatings). Lastly, the Trial Chamber allegedly erred in fact in finding that Krnojelac was responsible as a superior for inhumane acts and cruel treatment (beatings).

3. On 15 April 2002, the Prosecution filed its notice of appeal alleging errors of law and fact committed by the Trial Chamber. The Prosecution presented seven grounds in support of its appeal. In its first ground of appeal, the Prosecution asserts that the Trial Chamber erred in law in

[2] This first ground of appeal includes four sub-grounds. According to Krnojelac, the Trial Chamber erred in holding that the duties and powers of prison warden scarcely changed with the outbreak of the armed conflict. The Trial Chamber erred in finding that Krnojelac had voluntarily accepted the position of prison warden. The Trial Chamber erred in holding that Krnojelac exercised supervisory responsibility over all subordinate personnel and detainees at the KP Dom and it also misevaluated the evidence given by some non-Serb Prosecution witnesses.

PURL: https://www.legal-tools.org/doc/46d2e5/

articulating its definition of joint criminal enterprise liability and in applying that definition to the facts of the case. Secondly, it is claimed that the Trial Chamber committed an error of law when it required that the Indictment refer to an "extended form" of joint criminal enterprise. The Prosecution's third ground of appeal argues that the Trial Chamber erred in fact in finding that Krnojelac neither knew nor had reason to know that his subordinates were torturing the detainees and, accordingly, concluding that he could not be held responsible pursuant to Article 7(3) of the Statute. Fourthly, the Trial Chamber committed an error of fact in finding that, for the purposes of Article 7(3) of the Statute, the information available to Krnojelac was insufficient to put him on notice that his subordinates were involved in the murder of detainees at the KP Dom. Fifthly, the Trial Chamber made a factual error in finding that the beatings constituting inhumane acts and cruel treatment were not inflicted on discriminatory grounds and that therefore Krnojelac could not be held responsible for persecution as a superior. Sixthly, the Trial Chamber erred by acquitting Krnojelac on the count of persecution based on forced labour. Lastly, according to the Prosecution, the Trial Chamber erred in acquitting Krnojelac on the count of persecution based on deportation and expulsion.[3] The Appeals Chamber further notes that both Appellants have appealed the sentence. Before reviewing Krnojelac's and the Prosecution's grounds of appeal more thoroughly, the Appeals Chamber considers it appropriate to elaborate on the standard for reviewing the findings made by the Trial Chamber.

[3] This seventh ground of appeal contains five sub-grounds that can be summarised as follows: the Trial Chamber erred in law by holding that displacement across national borders is a constituent element of deportation. The Trial Chamber erred in fact by ruling that 35 Muslim detainees transferred to Montenegro left of their own free will. The Trial Chamber erred in fact by ruling that the transfer of the 35 Muslim detainees to Montenegro was not based on discriminatory grounds. The Trial Chamber erred by not finding Krnojelac guilty of persecution (deportation) based on the transfer of a number of detainees to other locations in Bosnia. Lastly, the Trial Chamber erred by ruling that Krnojelac was not responsible under Article 7(1) of the Statute for deportation and expulsion constituting persecution.

PURL: https://www.legal-tools.org/doc/46d2e5/

II. APPLICABLE LAW

A. Applicable criteria for reviewing the alleged errors

4. Although the parties in this case have not challenged the criteria applicable on appeal for reviewing the alleged errors of law and fact, the Appeals Chamber nevertheless considers it appropriate to recall those criteria since some of the errors of law raised by the Prosecution were raised as issues of general importance and the Prosecution alleged that, with regard to various questions of fact, the errors presented by the Defence do not comply with the review criteria laid down in the Tribunal's case-law.

5. Unlike the procedures in force in some national systems, the appeals procedure provided for under Article 25 of the ICTY Statute is, by nature, corrective and does not therefore give rise to a *de novo* review of the case. This appeal system affects the nature of the submissions that a party may legitimately present on appeal as well as the general burden of proof that the party must discharge before the Appeals Chamber acts. Those criteria have been frequently referred to by the Appeals Chambers of the Tribunal and the ICTR[4] and are set out in sub-section 2, *infra*.

1. Issues of general importance

6. Article 24(1) of the Statute refers only to the errors of law *which render the decision invalid*, that is errors on a point of law which, if proven, affect the guilty verdict. However, the case-law of the *ad hoc* tribunals accepts that there are situations where the Appeals Chamber may raise questions *proprio motu* or agree to examine alleged errors which will not affect the verdict but which do, however, raise an issue of general importance for the case-law or functioning of the Tribunal.

7. In the *Tadić* case, the Prosecution invoked several grounds of appeal, three of which raised issues of general importance for the case-law or functioning of the Tribunal. The Prosecution acknowledged that the Appeals Chamber's decision would not influence the Trial Chamber's verdict on the relevant counts. Yet the Appeals Chamber considered that it was competent to deal with issues which, although they do not affect the verdict handed down by a Trial Chamber, are of general importance for the Tribunal's case-law. The main concern is to ensure the development of

[4] The Appeals Chamber of the Tribunal ruled several times on the review criteria on appeal in the *Erdemović* (para. 16), *Tadić* (paras. 238 to 326), *Aleksovski* (para. 63), *Furundžija* (paras. 35 to 37), *Čelebići* (para. 435), *Kupreškić* (paras. 22 to 32) and *Kunarac* (paras. 35 to 47) Appeals Judgements. Moreover, the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR") set out similar criteria in the *Serushago* (para. 22), *Akayesu* (paras. 18 to 28

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the Tribunal's case-law and the standardisation of the applicable law. It is appropriate to consider an issue of general importance where its resolution is deemed important for the development of the Tribunal's case-law and it involves an important point of law that merits examination. This is because the Appeals Chamber must give the Trial Chambers guidance in their interpretation of the law. This role of final arbiter of the law applied by the Tribunal should be seen in the light of the Tribunal's specific character and, in particular, of its *ad hoc*, temporary nature.

8. In the *Akayesu* Appeals Judgement, the ICTR Appeals Chamber held that the fact that an appeal was founded exclusively on issues of general importance did not fundamentally alter the facts of the problem. It noted that the aim of addressing issues of general importance was not to create a new ground of appeal or a possible consultative power:

> 23. […] On the other hand, [the Appeals Chamber] may deem it necessary to pass on issues of general importance if it finds that their resolution is likely to contribute substantially to the development of the Tribunal's jurisprudence. The exercise of such a power is not contingent upon the raising of grounds of appeal which strictly fall within the ambit of Article 24 of the Statute. In other words, it is within its discretion. While the Appeals Chamber may find it necessary to address issues, it may also decline to do so. In such a case (if the Appeals Chamber does not pass on an issue raised), the opinion of the Trial Chamber remains the sole formal pronouncement by the Tribunal on the issue at bar. It will therefore carry some weight.[5]
>
> 24. Therefore, the Appeals Chamber will not consider all issues of general significance. Indeed, the issues raised must be of interest to legal practice of the Tribunal and must have a nexus with the case at hand.

9. In this case, the Prosecution has raised several general issues of which the Appeals Chamber has considered the admissibility and, where appropriate, the merits.

2. Applicable review criteria of the allegations of errors in general and the errors of fact in particular

10. With regard to the alleged errors of law, the Appeals Chamber recalls that, as arbiter of the law applicable before the International Tribunal, when a party raises such an allegation, it is bound in principle to determine whether an error was in fact committed on a substantive or procedural issue. The case-law recognises that the burden of proof on appeal is not absolute with regard to errors of law. The Appeals Chamber does not review the Trial Chamber's findings on questions of law merely to determine whether they are reasonable but rather to determine whether they are correct. Nevertheless, the party alleging an error of law must, at least, identify the alleged error,

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and 232), *Kayishema/Ruzindana* (para. 143), *Musema* (paras. 16 to 19) and *Rutaganda* (paras. 17 to 24) Appeals Judgements.

[5] Footnotes omitted.

PURL: https://www.legal-tools.org/doc/46d2e5/

present arguments in support of its claim and explain how the error invalidates the decision. An allegation of an error of law which has no chance of resulting in an impugned decision being quashed or revised is not *a priori* legitimate and may therefore be rejected on that ground.

11. As regards errors of fact, the party alleging this type of error in support of an appeal against a conviction must provide evidence both that the error was committed and that this occasioned a miscarriage of justice. The Appeals Chamber has regularly pointed out that it does not lightly overturn findings of fact reached by a Trial Chamber. This approach is explained principally by the fact that only the Trial Chamber is in a position to observe and hear the witnesses testifying and is thus best able to choose between two diverging accounts of the same event. First instance courts are in a better position than the Appeals Chamber to assess witnesses' reliability and credibility and determine the probative value of the evidence presented at trial.

12. Thus, when considering this type of error the Appeals Chamber applies the "reasonable nature" criterion to the impugned finding. Only in cases where it is clear that no reasonable person would have accepted the evidence on which the Trial Chamber based its finding or when the assessment of the evidence is absolutely wrong can the Appeals Chamber intervene and substitute its own finding for that of the Trial Chamber. Thus, the Appeals Chamber will not call the findings of fact into question where there is reliable evidence on which the Trial Chamber might reasonably have based its findings. It is accepted moreover that two reasonable triers of fact might reach different but equally reasonable findings. A party suggesting only a variation of the findings which the Trial Chamber might have reached therefore has little chance of a successful appeal, unless it establishes beyond any reasonable doubt that *no* reasonable trier of fact *could have* reached a guilty finding.

13. When a party succeeds in establishing that an error of fact was committed in accordance with those criteria, the Appeals Chamber still has to accept that the error occasioned a miscarriage of justice such that the impugned finding should be revoked or revised. The party alleging a miscarriage of justice must, in particular, establish that the error strongly influenced the Trial Chamber's decision and resulted in a flagrant injustice, such as where an accused is convicted despite lack of evidence pertaining to an essential element of the crime.

14. In the *Bagilishema* case, the ICTR Appeals Chamber held that the standard of unreasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal. The Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the challenged finding. However, since the Prosecution must establish the guilt of the accused at trial, the

PURL: https://www.legal-tools.org/doc/46d2e5/

significance of an error of fact occasioning a miscarriage of justice takes on a specific character when alleged by the Prosecution. This is because it has the more difficult task of showing that there is no reasonable doubt about the appellant's guilt when account is taken of the Trial Chamber's errors of fact.

15. In light of the above, in order for the appeal to succeed it is vital for the party alleging an error of fact or on a point of law to meet the criteria for review on appeal. In principle, the Appeals Chamber is not obliged to consider a party's submissions if they do not relate to an error of law which invalidates the decision or an error of fact occasioning a miscarriage of justice. There is therefore no point whatsoever in a party reiterating arguments which failed at trial on appeal, unless the party demonstrates that the fact that they were dismissed resulted in an error such as to justify the Appeals Chamber intervening. The Appeals Chamber in the *Kupreškić* Appeals Judgement stated that when a party is not able to explain how an alleged error renders the decision invalid, in general, it must refrain from appealing on that point. The Appeals Chamber considers that this principle holds for alleged errors of both fact and law. Consequently, when there is no chance of a party's submissions leading to a challenged decision being quashed or revised, the Appeals Chamber may reject them, at the outset, as being invalid and it does not have to consider them on the merits.

16. As regards the formal requirements, the Appeals Chamber in the *Kunarac* Appeals Judgement specified that it cannot be expected to consider the parties' claims in detail if they are obscure, contradictory or vague or if they are vitiated by other blatant formal defects. In this regard, paragraph 13 of the Practice Direction on the Formal Requirements for Appeals from Judgements of 16 September 2002 states that "where a party fails to comply with the requirements laid down in […] [the] Practice Direction, or where the wording of a filing is unclear or ambiguous, a designated Pre-Appeal Judge or the Appeals Chamber may, within its discretion, decide upon an appropriate sanction, which can include an order for clarification or re-filing. The Appeals Chamber may also reject a filing or dismiss submissions therein." The party appealing must therefore set out the sub-grounds and submissions of its appeal clearly and provide the Appeals Chamber with specific references to the sections of the appeal case it is putting forward in support of its claims. From a procedural point of view, the Appeals Chamber has discretion under Article 25 of the Statute to determine which of the parties' submissions warrant a reasoned written response. The Appeals Chamber does not have to provide a detailed written explanation of its position with regard to arguments which are clearly without foundation. It must focus its attention on the essential issues of the appeal. In principle, therefore, it will reject without detailed reasoning arguments raised by the Appellants in their briefs or at the appeal hearing if they are obviously ill-founded.

PURL: https://www.legal-tools.org/doc/46d2e5/

17. Here, the Prosecution raised the problem of the review criteria on appeal as a preliminary matter in its Response.[6] It claims that some sections of the Defence Brief lack clarity as to the alleged errors of law and fact and that, in relation to various factual issues, Krnojelac has presented the arguments raised at trial (sometimes virtually verbatim) without referring to any part of the Judgment and without identifying in its analysis or submissions any error occasioning a miscarriage of justice.[7] The Prosecution submits that, in those circumstances, Krnojelac has not satisfied the burden of proof on appeal.[8]

18. Given the aforementioned case-law, the Appeals Chamber finds that the question is whether the Defence has presented grounds of appeal that are invalid in accordance with the Tribunal's case-law and are thus to be rejected outright because the Defence has not satisfied the review criteria on appeal.

3. Admissibility of the grounds of appeal presented by the parties

19. The Appeals Chamber considers that almost all of the Defence's sub-grounds and grounds of appeal based on errors of fact in this case are invalid for the reasons set out below. The Appeals Chamber notes that, for each ground of appeal, it is a matter of determining whether the Defence has satisfied the burden of proof as set out above. The grounds of appeal will therefore be considered from this perspective alone. The merits of the submissions presented in support of the grounds of appeal will not be examined at all.

20. Generally, with the exception of one ground of appeal, the Defence makes no submission in its Brief to the effect that the Trial Chamber's findings were unreasonable. The Appeals Chamber cannot identify the Trial Chamber's alleged error. It seems that the Defence is only *challenging* the Trial Chamber's findings and suggesting an alternative assessment of the evidence. However, it is not enough merely to challenge the Judgment in order to show that the Trial Chamber's findings were made in error. Insofar as it does not indicate in what aspects the Trial Chamber's assessment of the evidence is unreasonable and erroneous, the Defence fails to discharge the burden of proof incumbent on it when alleging errors of fact.

21. The first ground of appeal on the issue of Krnojelac's position as prison warden is made up of four sub-grounds of appeal all based on errors of fact[9] as previously indicated.[10] With specific

[6] Prosecution Response, paras. 1.1 to 1.22.
[7] *Ibid*., para. 1.8.
[8] T(A), 15 May 2003, p. 260.
[9] Defence Notice of Appeal, p. 2.
[10] See introduction to this Judgement.

PURL: https://www.legal-tools.org/doc/46d2e5/

regard to the first sub-ground of the first ground of appeal, according to which the Trial Chamber erred in concluding that the internal structure of the KP Dom had not changed after the outbreak of the war and that the position and powers of the warden within the prison hierarchy had not changed as compared with the period before 18 April 1992,[11] the Defence referred only to parts of the evidence which, taken together with certain facts, show that the "KPD structure could not remain the same".[12] This assertion does not enable the Appeals Chamber to ascertain the Trial Chamber's alleged specific error. In this case, it is impossible to infer from the Defence Brief in what way the Trial Chamber's interpretation of the evidence was entirely erroneous. Similarly, it is impossible to know how the evidence referred to by the Defence affected the Trial Chamber's reasoning and findings. In those circumstances, the Appeals Chamber cannot consider this sub-ground to be valid.

22. In the second sub-ground of the first ground of appeal, the Defence asserts that the Trial Chamber erred in concluding that Krnojelac voluntarily accepted the position of warden of the KP Dom.[13] In its Brief, the Defence merely suggests another interpretation of the evidence and does not indicate how the Trial Chamber's evaluation was erroneous. The Appeals Chamber finds that it is not enough merely to assert that the witnesses' testimony casts doubt on the Trial Chamber's findings; submissions must also be presented as to the possible error made by the Trial Chamber, not by reference to possible interpretations of the evidence but, for instance, by reference to the Trial Chamber's erroneous assessment of the testimony, its failure to take account of some of the evidence or possible contradictions in its reasoning or findings of fact. Accordingly, the Appeals Chamber cannot consider this a valid sub-ground.

23. As regards the third sub-ground of the first ground of appeal, the Defence submits essentially that the Trial Chamber erred in concluding that there was no significant division between military and civilian personnel within the KP Dom. All were responsible to the warden who had the power to take disciplinary measures against them and Krnojelac, as warden, retained jurisdiction over all detainees in the KP Dom.[14] It presents the testimony of a number of witnesses which it believes is "sufficient […] to cast a reasonable doubt on the […] erroneous conclusions of the Trial Chamber concerning the unchanged hierarchy within KPD despite its surrender to the army".[15] Likewise, it refers to parts of the evidence which, it argues, "are in no way of a nature that lead beyond any reasonable doubt to a conclusion that the Accused, in the capacity he had in KPD

[11] Defence Brief, paras. 16 to 32.
[12] *Ibid.*, para. 29. These arguments were reiterated at the appeal hearing (T(A), 15 May 2003, p. 208).
[13] Defence Brief, paras. 31 to 41.
[14] Defence Notice of Appeal, p. 2.
[15] Defence Brief, para. 58.

PURL: https://www.legal-tools.org/doc/46d2e5/

in the relevant period, was in charge of Muslim detainees in KPD".[16] The Defence thus submits that Krnojelac "was in no way responsible for persons who were kept in that part of the KP Dom […] [nor had he] any authority over the prison guards",[17] and that the evidence cited bears out this interpretation of the facts. As the Appeals Chamber has already stated, merely referring to the witnesses' testimony and suggesting an alternative interpretation of it is not enough to demonstrate that the Trial Chamber's findings were unreasonable. As the Defence's submissions on this sub-ground of appeal do not go beyond suggesting an alternative interpretation of the evidence adduced at trial, the Appeals Chamber declares this sub-ground invalid.

24. As for the fourth sub-ground in support of the first ground of appeal which raises the issue of the "hierarchy within KPD and the Accused's position as viewed by detained non-Serbs, witnesses for the Prosecution",[18] the Defence proposes "to analyze the views of a great many witnesses, non-Serbs, who spent quite a long time in KPD, with respect to the hierarchy prevailing in KPD and the Accused Krnojelac's position as seen by them".[19] No specific error is alleged in support of this sub-ground of appeal. In addition, it appears that the Defence Brief essentially replicates submissions put to the Trial Chamber in the Final Trial Brief. This sub-ground must therefore be declared invalid.

25. In support of the third and fourth grounds of appeal, which the Appeals Chamber construes as allegations of errors of fact, the Defence challenges the Trial Chamber's findings relating to Krnojelac's individual responsibility for aiding and abetting cruel treatment as a violation of the laws or customs of war (living conditions)[20] and its findings on Krnojelac's responsibility as a command superior within the meaning of Article 7(3) of the Statute for acts of persecution as a crime against humanity based on beatings.[21] Here again, the Defence does nothing more in these two grounds of appeal than substitute its own interpretation of the evidence adduced at trial in support of its submission that the Trial Chamber's findings were erroneous. In support of the third ground of appeal, it proposes to "single out from the corps of evidence only the evidence challenging the conclusions of the Trial Chamber and casting a reasonable doubt"[22] on its findings but does not identify the specific error committed by the Trial Chamber. By merely putting forward a different conclusion inferable from the trial record without even stating what type of error the Trial Chamber supposedly made in relation to the evidence, the Defence has failed to discharge its

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[16] *Ibid.*, para. 70.
[17] T(A), 15 May 2003, p. 224.
[18] Defence Brief, paras. 100 to 114.
[19] *Ibid.*, para. 100.
[20] Defence Brief, paras. 154 to 175 (third ground of appeal).
[21] *Ibid.*, paras. 176 to 187 (fourth ground of appeal).

PURL: https://www.legal-tools.org/doc/46d2e5/

burden of proof on appeal.[23] As for the fourth ground of appeal, the Defence essentially points to a certain amount of the evidence and testimony presented in support of the first ground of appeal showing that Krnojelac was not part of the command structure in place. However, here again, a mere assertion that the Trial Chamber erred is insufficient. The alleged error must also be identified and particularised so that the Appeals Chamber is in a position to respond. Likewise, an assertion that the Trial Chamber failed to provide satisfactory reasons for its finding of discriminatory intent behind the beatings inflicted upon Džemo Balić is not sufficient for the Trial Chamber's finding on this point to be held to be unreasonable.[24] Consequently, for all of these reasons, these grounds of appeal are invalid.

26. The Appeals Chamber points out that the parties had their attention drawn to the criteria for review at the appeal hearing.[25] In particular, the Presiding Judge of the Appeals Chamber[26] and then its Judges[27] addressed the Defence on this point. Despite these reminders, the Defence failed to provide better particulars of the errors alleged in support of the aforesaid grounds and sub-grounds. In any event, it did not provide the Appeals Chamber with any information which it could use in dealing with the grounds.

27. In the light of the foregoing, the Appeals Chamber will not examine the first, second, third or fourth sub-grounds of the Defence's first ground of appeal or its third and fourth grounds of appeal. Some of the Defence's submissions on the remaining fifth ground of appeal satisfy the burden of proof. The Appeals Chamber will therefore consider them on the merits.

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[22] *Ibid.*, para. 159.
[23] In connection with this ground of appeal, the Prosecution stated that: "the findings of the Trial Chamber were based on all the evidence before it, and its findings cannot be said to be unreasonable merely because some items of evidence are inconsistent with the Trial Chamber's findings or are consistent with the Defence theory of the facts. It is submitted that in relation to this ground of appeal, the Defence has not discharged its burden of establishing that on all of the relevant evidence, no reasonable trier of fact could have reached the conclusion that the Trial Chamber did." (Prosecution Response, para. 4.2).
[24] The Defence asserts "that it was not established beyond reasonable doubt, either, that the beating of Džemo Balić had been carried out upon discriminatory basis, in view of the fact that the Trial Chamber does not provide the reasons, concretely relating to this incident, as to why it is convinced that this beating had been performed for the purpose of discrimination." (Defence Appeal, para. 185).
[25] T(A), 14 May 2003, pp. 45 to 47.
[26] T(A), 15 May 2003, pp. 223 and 224. See also, T(A), 15 May 2003, pp. 240 to 241.
[27] T(A), 15 May 2003, pp. 230 to 232.

PURL: https://www.legal-tools.org/doc/46d2e5/

B. Law applicable to the joint criminal enterprise and aiding and abetting

1. Joint criminal enterprise

28. Article 7(1) of the Statute sets out several forms of individual criminal responsibility which apply to all the crimes falling within the Tribunal's jurisdiction. It reads as follows:

> **Article 7**
> **Individual criminal responsibility**
>
> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

29. This provision lists the forms of criminal conduct which, provided all the other conditions are satisfied, may result in the accused's incurring criminal responsibility if he has committed any one of the crimes provided for by the Statute in one of the ways set out in this provision. Article 7(1) of the Statute does not make explicit reference to "joint criminal enterprise". However, the Appeals Chamber recalls that, after considering the question in the *Tadić* Appeals Judgement,[28] it concluded that participation in a joint criminal enterprise as a form of liability, or the theory of common purpose as the Chamber referred to it, was implicitly established in the Statute and existed in customary international law at the time of the facts, that is in 1992. The Appeals Chamber also specified that the commission of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose:

> 220. In sum, the Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal. […].
>
> 226. The Appeals Chamber considers that the consistency and cogency of the case-law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law and in national legislation, warrant the conclusion that case law reflects customary rules of international criminal law.

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[28] To reach this finding in the *Tadić* Appeals Judgement, the Appeals Chamber interpreted the Statute on the basis of its purpose as set out in the report of the United Nations Secretary-General to the Security Council. It also considered the specific characteristics of many crimes perpetrated in war. In order to determine the status of customary law in this area, it studied in detail the case-law relating to many war crimes cases tried after the Second World War. It also considered the relevant provisions of two international Conventions which reflect the views of a great many States in legal matters (Article 2(3)(c) of the International Convention for the Suppression of Terrorist Bombings, adopted by a consensus vote by the General Assembly in its resolution 52/164 of 15 December 1997 and opened for signature on 9 January 1998; Article 25 of the Statute of the International Criminal Court, adopted on 17 July 1998 by the Diplomatic Conference of Plenipotentiaries held in Rome). Moreover, the Appeals Chamber referred to national legislation and case-law stating that it was a matter of specifying that the notion of common purpose, established in international criminal law, has foundations in many national systems, while asserting that it was not established that most, if not all of the countries, have the same notion of common purpose.

PURL: https://www.legal-tools.org/doc/46d2e5/

> 188. This provision [Article 7(1) of the Statute] covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. However, the commission[29] of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose.
>
> 191. [...] Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less - or indeed no different - from that of those actually carrying out the acts in question.
>
> 192. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as an aider and abettor might understate the degree of their criminal responsibility.

These findings were recently upheld by the Appeals Chamber in its ruling on Dragoljub Ojdanić's Motion Challenging Jurisdiction:

> 19. As noted in the *Tadić* Appeal Judgment, the Secretary-General's Report provided that "all persons" who participate in the planning, preparation or execution of serious violations of international humanitarian law contribute to the commission of the violation and are therefore individually responsible.[30] Also, and on its face, the list in Article 7(l) appears to be non-exhaustive in nature as the use of the phrase "*or otherwise* aided and abetted" suggests. But the Appeals Chamber does not need to consider whether, outside those forms of liability expressly mentioned in the Statute, other forms of liability could come within Article 7(l). It is indeed satisfied that joint criminal enterprise comes within the terms of that provision.[31]
>
> 20. In the present case, Ojdanić is charged as a co-perpetrator in a joint criminal enterprise the purpose of which was, *inter alia*, the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province.[32] The Prosecution pointed out in its indictment against Ojdanić that its use of the word "committed" was not intended to suggest that any of the accused physically perpetrated any of the crimes charged, personally. By the term "committing", the Prosecution means participation in a joint criminal enterprise as a co-perpetrator.[33] Leaving aside the appropriateness of the use of the expression "co-perpetration" in such a context, it would seem therefore that the Prosecution charges co-perpetration in a joint criminal enterprise as a form of "commission" pursuant to Article 7(l) of the Statute, rather than as a form of accomplice liability. The Prosecution's approach is correct to the extent that, insofar as a participant shares the purpose of the joint criminal enterprise (as he or she must do) as opposed to merely knowing about it, he or she cannot be regarded as a mere aider and abettor to the crime which is contemplated. Thus, the Appeals Chamber views participation in a joint criminal enterprise as a form of "commission" under Article 7(1) of the Statute.[34]

30. After considering the relevant case-law, relating principally to many war crimes cases tried after the Second World War, the *Tadić* Appeals Judgement sets out three categories of cases regarding joint criminal enterprise:

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[29] It should be noted that the authoritative English version uses the term commission.
[30] *Tadić* Appeals Judgement, para. 190, quoting paragraph 54 of the Secretary-General's Report.
[31] *Ojdanić* Decision.
[32] Indictment, para. 16.
[33] Indictment, para. 16.
[34] Emphasis added.

PURL: https://www.legal-tools.org/doc/46d2e5/

The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.[35]

[…] The second distinct category of cases is in many respects similar to that set forth above, and embraces the so-called "concentration camp" cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan. Cases illustrative of this category are Dachau Concentration Camp,[36] decided by a United States court sitting in Germany and Belsen,[37] decided by a British military court sitting in Germany. In these cases the accused held some position of authority within the hierarchy of the concentration camps. Generally speaking, the charges against them were that they had acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes.[38] In his summing up in the *Belsen* case, the Judge Advocate adopted the three requirements identified by the Prosecution as necessary to establish guilt in each case: (i) the existence of an organised system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused's awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, i.e., encouraged, aided and abetted or in any case participated in the realisation of the common criminal design. The convictions of several of the accused appear to have been based explicitly upon these criteria. This category of cases is really a variant of the first category.[39]

[…] The third category concerns cases involving a common design where one of the perpetrators commits an act which, while outside the common design, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (in other words to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those

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[35] *Tadić* Appeals Judgement, para. 196.
[36] *Trial of Martin Gottfried Weiss and Thirty-Nine Others*, General Military Government Court of the United States Zone, Dachau, Germany, 15 November to 13 December 1945, *Law Reports*, vol. XI, p. 5.
[37] *Trial of Josef Kramer and 44 Others,* British Military Court, Luneberg, 17 September to 17 November 1945, *Law Reports,* vol. II, p. 1.
[38] See the *Dachau Concentration Camp* case*, Law Reports*, vol. XI, p. 14:
"It seems, therefore, that what runs throughout the whole of this case, like a thread, is this: that there was in the camp a general system of cruelties and murders of the inmates (most of whom were allied nationals) and that this system was practised with the knowledge of the accused, who were members of the staff, and with their active participation. Such a course of conduct, then, was held by the court in this case to constitute acting in pursuance of a common design to violate the laws and usages of war. Everybody who took any part in such common design was held guilty of a war crime, though the nature and extent of the participation may vary". In this case, the Judge Advocate summarised with approval the legal argument of the Prosecution in the following terms: "The case for the Prosecution is that all the accused employed on the staff at Auschwitz knew that a system and a course of conduct was in force. In one way or another, in furtherance of a common agreement to run the camp in a brutal way, all those people were taking part in that course of conduct. They asked the Court not to treat the individual acts which might be proved merely as offences committed by themselves, but also as evidence clearly indicating that the particular offender satisfied that they were doing so , then they must, each and every one of them, assume responsibility for what happened." (*Belsen* case, *Law Reports*, vol. II, p. 121). In particular, the accused Kramer appears to have been convicted on that basis. See *ibid.*, p. 121: "The Judge Advocate reminded the Court that when they considered the question of guilt and responsibility, the strongest case must surely be against Kramer, and then down the list of accused *according to the positions they held*" (emphasis added).
[39] *Tadić* Appeals Judgement, paras. 202 and 203.

PURL: https://www.legal-tools.org/doc/46d2e5/

> civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk […]. The case law in this category concerned first of all cases of mob violence, that is situations of disorder where multiple offenders act out a common purpose, where each of them commit offences against the victim but where it is unknown or impossible to ascertain exactly which acts were carried out by which perpetrator, or when the causal link between each act and the eventual harm caused to the victims is similarly indeterminate. The cases most illustrative of this category are *Essen Lynching* and *Borkum Island*.[40]

31. The same Judgement then sets out the constituent elements of the *actus reus* and *mens rea* of this form of liability. The Appeals Chamber declares that the *actus reus* of this mode of participation in one of the crimes provided for in the Statute is common to each of the three categories of cases set out above and comprises the following three elements:

> (i) *A plurality of persons.* They need not be organised in a military, political or administrative structure, as is demonstrated clearly by the *Essen Lynching* and the *Kurt Goebell* cases.
>
> (ii) *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.
>
> (iii) *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.[41]

32. The Appeals Chamber considered that the *mens rea* differs according to the category of common design under consideration:

- The first category of cases requires the intent to perpetrate a specific crime (this intent being shared by all the co-perpetrators).

- For the second category which, as noted above, is a variant of the first, the accused must have personal knowledge of the system of ill-treatment (whether proven by express testimony or inferred from the accused's position of authority), as well as the intent to further this concerted system of ill-treatment.

- The third category requires the *intent* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or, in any event, to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, in the circumstances of

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[40] *Tadić* Appeals Judgement, para. 204.
[41] *Ibid*., para. 227.

PURL: https://www.legal-tools.org/doc/46d2e5/

the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.[42]

2. Differences between participating in the joint criminal enterprise as a co-perpetrator and aiding and abetting

33. Also in the *Tadić* Appeals Judgement, the Appeals Chamber made a clear distinction between acting in pursuance of a common purpose or design to commit a crime and aiding and abetting the commission of a crime.

> (i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.
>
> (ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.
>
> (iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.
>
> (iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.[43]

[42] *Ibid.*, para. 228.
[43] *Ibid*., para. 229.

PURL: https://www.legal-tools.org/doc/46d2e5/

III. KRNOJELAC'S APPEAL

34. As indicated previously and in the light of the application of the review criteria on appeal, the Appeals Chamber will examine the merits of only the second and fifth grounds of appeal presented by Krnojelac in support of his appeal.

A. Krnojelac's second ground of appeal: aiding and abetting persecution (imprisonment and living conditions)

35. Krnojelac requests the Appeals Chamber to overturn the Trial Chamber's finding of guilt in respect of persecution (imprisonment and inhumane acts based on the living conditions imposed on the non-Serb civilian detainees) as a crime against humanity.[44] He breaks his argument down into three main sub-grounds presented as errors of law. He disputes the Trial Chamber's finding that he was an aider and abettor to the crime of persecution based on imprisonment (1) without specifying on which acts or omissions this finding is based or how he played a significant role in the commission of the crimes in question by the principal offenders, (2) without establishing unequivocally that he knew that, by his acts or omissions, he was contributing significantly to the underlying crime committed by the principal offenders (imprisonment as persecution) and that he was aware of the discriminatory intent of those perpetrators and (3) without requiring that an aider and abettor to the crime of persecution share the discriminatory intent of the perpetrator(s) of the offence. Krnojelac alleged the same errors of law in respect of his conviction as an aider and abettor to the crime of persecution based on living conditions. In dealing with the first allegation, the Appeals Chamber will examine each of the two crimes underlying the crime of persecution separately (imprisonment and living conditions). It will then do the same for the second allegation before going on to examine the third alleged error of law, in respect of which no distinction need be made between the two underlying crimes.

1. First sub-ground: Krnojelac's acts or omissions and their significance for the commission of the crime of persecution based on imprisonment and living conditions

36. Krnojelac asserts that the Trial Chamber committed an error of law when it found him guilty of aiding and abetting persecution based on the imprisonment of the non-Serb civilian detainees and the living conditions to which they were subjected without stating how he had contributed significantly to the commission of the crimes by the principal perpetrators.

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[44] Defence Brief, para. 153.

PURL: https://www.legal-tools.org/doc/46d2e5/

37. The Appeals Chamber will first examine the merits of this sub-ground in relation to imprisonment and then to the living conditions. The Appeals Chamber considers this sub-ground an allegation of insufficient reasoning for the *actus reus* of aiding and abetting. As a preliminary observation, it notes that, by his acts or omissions, the aider and abettor must assist, encourage or lend moral support to the principal perpetrator of the crime and this support must have a substantial effect upon the perpetration of the crime.[45]

(a) Imprisonment

38. Krnojelac holds that the Trial Chamber established only that he was present at the scene of the crime, whereas the Judgment states that presence alone cannot constitute aiding and abetting.[46] He contends that the Trial Chamber omitted to state clearly and unequivocally the concrete acts and omissions by which he made a significant contribution to the perpetration of the crime of persecution based on imprisonment. The Prosecution responds that, on the contrary, the Trial Chamber meticulously analysed Krnojelac's duties as prison warden and clearly noted that, by discharging his duties, he assisted the principal perpetrators of the crimes in maintaining an unlawful system. The Prosecution also submits that Krnojelac failed to show that the finding was unreasonable.[47] It further argues that it was legally permissible for the Trial Chamber to find that Krnojelac had become an aider and abettor to the crime by omission - for example by failing to prevent it - if such an omission had a direct and significant effect on the perpetration of the crime.[48]

39. The Appeals Chamber notes that the text of the Judgment is at odds with Krnojelac's assertion that the Trial Chamber failed to specify by which acts or omissions he assisted, encouraged or lent moral support to the principal perpetrators of the crime of persecution based on the imprisonment of the non-Serb civilian detainees which had a substantial effect on the perpetration of the crime by those perpetrators. The Appeals Chamber notes specifically that, in the chapter of the Judgment dealing with Krnojelac's position as prison warden, the Trial Chamber found that he "held the position of warden, as that term is generally understood,"[49] and stated that the "position of prison warden, in the ordinary usage of the word, necessarily connotes a supervisory role over all prison affairs."[50] The Trial Chamber further established that Krnojelac had voluntarily accepted the post and resigned only in June 1993.[51] It examined the nature of his duties

[45] See *Tadić* Appeals Judgment, para. 229.
[46] Defence Brief, paras. 124 to 131.
[47] Prosecution Response, paras. 3.5 to 3.11.
[48] *Ibid.,* paras. 3.12 to 3.16.
[49] Judgment, para. 107.
[50] *Ibid*., para. 97.
[51] *Ibid*., paras. 99 and 100.

PURL: https://www.legal-tools.org/doc/46d2e5/

as warden more thoroughly in paragraphs 102 to 107 of the Judgment where it stated that it was satisfied that the lease agreement signed by Krnojelac related only to the use by the military of the property of the KP Dom and that Krnojelac retained all powers associated with the pre-conflict position of prison warden, including measures taken to prevent escapes and supervision of camp supplies.[52]

40. The Appeals Chamber observes that the Trial Chamber did not reiterate these findings in the section of the Judgment dealing with Krnojelac's responsibility for the persecution based on imprisonment. The Appeals Chamber notes that the Trial Chamber did however conclude in that section that Krnojelac held the most senior position within the KP Dom[53] and that he had allowed civilians to be detained knowing that their detention was unlawful.[54] The Trial Chamber also referred to its finding that Krnojelac had accepted the position of warden voluntarily and that he could have refused or resigned from the position but chose not to do so.[55] The Trial Chamber was likewise satisfied that Krnojelac knew that his acts and omissions were contributing to the maintenance of the unlawful system of imprisonment by the principal offenders.[56] It is the opinion of the Appeals Chamber that, in so doing, the Trial Chamber implicitly referred to its findings in the previous chapter of the Judgment describing Krnojelac's acts.

41. The Appeals Chamber therefore dismisses the first limb of Krnojelac's sub-ground to the effect that there was insufficient reasoning with regard to the determination of his acts or omissions significantly contributing to the perpetration of the underlying crime of imprisonment.

(b) Living conditions

42. Krnojelac argues first that the Trial Chamber did not specify which of his concrete acts and omissions furthered the persecution based on living conditions at the KP Dom. He also contends that the Trial Chamber did not establish either the part he played in the persecution or how significant it was.[57] The Prosecution responds that this assertion is without foundation. It adds that the Trial Chamber concluded that Krnojelac took part in the persecution by (1) carrying out the duties of prison warden and the most senior person at the KP Dom, and (2) failing to take the

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[52] *Ibid*., para. 103. See also footnotes 308 to 310 which detail the steps taken by Krnojelac as warden of the KP Dom to obtain the appropriate authorities' approval for his requests for food supplies, hygiene products, detainee transportation and additional security personnel. Of particular note is the reference to exhibit D107A, a request from Krnojelac dated 3 March 1993 sent to the Foča garrison in which he makes express reference to the presence of the Muslim detainees in addition to the Serb criminals in order to justify his request for food supplies.
[53] *Ibid*., para. 126.
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid*., para. 127. The merits of this finding are examined in the following paragraph of this Judgement.

PURL: https://www.legal-tools.org/doc/46d2e5/

measures required by the offences which he was aware were being committed against the detainees under his authority, thereby encouraging the principal offenders.[58] In addition, Krnojelac argues that the Trial Chamber did not establish the part he allegedly played in "the creation of such living conditions",[59] to which the Prosecution responds that an aider and abettor need not necessarily have taken part in creating a system.[60]

43. The Appeals Chamber takes the view that the Prosecution did not need to prove that Krnojelac was responsible for creating the living conditions imposed on the non-Serb detainees in order to establish his liability as an aider and abettor to the principal offenders who established and maintained those conditions. It was enough that Krnojelac consciously and significantly contributed to the maintenance of the living conditions. The Appeals Chamber notes that the Trial Chamber found that Krnojelac knew in what conditions the non-Serb detainees were being held and the effects this was having on their physical and psychological health,[61] was aware of the intent of the principal offenders, guards and military authorities, and knew that his failure to take any action as warden in relation to this knowledge contributed in a substantial way to the continued maintenance of those conditions by encouraging the principal offenders to maintain them.[62] For this reason, the Appeals Chamber points out that, contrary to Krnojelac's assertions, the Trial Chamber did characterise the omission justifying his conviction as an aider and abettor to the perpetrators responsible for the inhumane living conditions imposed upon the non-Serb detainees.

44. The Appeals Chamber therefore dismisses the second claim of Krnojelac's sub-ground alleging insufficient reasoning insofar as it relates to the determination of his acts or omissions which significantly contributed to the maintenance of the living conditions. The Appeals Chamber will now turn to the second sub-ground of this ground of appeal.

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[57] Defence Brief, paras. 148 to 152.
[58] Prosecution Response, para. 3.51.
[59] Defence Brief, para. 148.
[60] Prosecution Response, para. 3.51.
[61] The merits of this finding, which appear in paragraph 169 of the Judgment, are examined in the following sub-section. Paragraph 169 states that a number of detainees gave evidence that they met with Krnojelac and told him about their suffering and, moreover, that Krnojelac admitted to habitually meeting with detainees and confirmed that, during these conversations, the detainees discussed their living conditions at the KP Dom. The Judgment also sets out the Trial Chamber's findings detailing the living conditions imposed upon the non-Serb detainees which resulted from a deliberately discriminatory policy (isolation (para. 134); overcrowding (para. 135); deplorable standards of hygiene (para. 136); lack of protection against the cold (para. 137); undernourishment (para. 139); lack or insufficiency of medical care (para. 141); psychological suffering (paras. 142 and 143) and effects of these conditions on the detainees' physical and psychological state (paras. 146 to 168).
[62] Judgment, para. 171.

PURL: https://www.legal-tools.org/doc/46d2e5/

2. Second sub-ground: Krnojelac's awareness that, by his acts or omissions, he was contributing significantly to the underlying crimes committed by the principal offenders (persecution based on imprisonment and living conditions) and his knowledge of the offenders' discriminatory intent

45. In contrast to the previous sub-ground, this relates not to the *actus reus* of aiding and abetting persecution but to the *mens rea*. Likewise, the Appeals Chamber considers that an error of fact is being alleged rather than an error of law. The Appeals Chamber will consider the two limbs of the second sub-ground in turn, examining imprisonment first and then living conditions.

(a) Imprisonment

46. Krnojelac submits that the Trial Chamber did not establish unequivocally that he knew that, by his acts or omissions, he was significantly contributing to the commission of the crime of imprisonment by its perpetrators and that they were acting in pursuance of a discriminatory objective.[63]

47. First of all, the Appeals Chamber notes that the Trial Chamber concluded that Krnojelac knew that his acts and omissions were contributing to the system of unlawful imprisonment in place at the KP Dom.[64] It also observes that the Trial Chamber found that Krnojelac had voluntarily accepted the position of KP Dom warden in full awareness that non-Serb civilians were being illegally detained there because of their ethnicity. The Trial Chamber stated that when he first arrived at the KP Dom, Krnojelac asked who was being detained and why, and the response he was given was that the prisoners were Muslims and were being detained for that reason. It went on to state that Krnojelac knew that none of the procedures in place for legally detained persons was ever followed at the KP Dom.[65] The Appeals Chamber points out that the Trial Chamber is, in principle, better placed to determine the probative value of the evidence presented at trial.[66] Here, Krnojelac does not try to demonstrate that the findings of fact at issue were unreasonable and, for this reason, the Appeals Chamber dismisses the arguments put forward.

(b) Living conditions

48. The Appeals Chamber notes that the Trial Chamber stated that a number of detainees gave evidence that they met with Krnojelac and told him about their suffering and that Krnojelac

[63] Defence Brief, para. 122.
[64] *Ibid.*
[65] *Ibid.*, para. 100.
[66] *Tadić* Appeals Judgement, para. 64. See also *Musema* Appeals Judgement, para. 18 and *Kunarac* Appeals Judgement, para. 39.

PURL: https://www.legal-tools.org/doc/46d2e5/

admitted to habitually meeting with detainees and confirmed that, during these conversations, the detainees discussed the living conditions at the KP Dom.[67] The Appeals Chamber reiterates that the Judgment contains many findings of fact detailing the living conditions imposed upon the non-Serb detainees. The Appeals Chamber also observes that the Trial Chamber expressly held that it was obvious to Krnojelac, as it would have been to anyone at the KP Dom, that the disparity between the treatment of the non-Serb and Serb detainees was deliberate and was effected by the intention of the principal offenders to discriminate against the non-Serb detainees on religious and political grounds.[68] The Appeals Chamber points out that Krnojelac does not try to show that the Trial Chamber's findings were unreasonable and therefore dismisses the arguments on this point.

3. Third sub-ground: the *mens rea* of the aider and abettor in an act of persecution

49. The Appeals Chamber will now turn to examine the third sub-ground of Krnojelac's second ground of appeal. Krnojelac alleges an error of law which raises the issue of whether, in order to establish the *mens rea* of the aider and abettor in an act of persecution, it is enough to show that the individual concerned voluntarily aided or encouraged the principal offender in the knowledge that the latter was acting with discriminatory intent or whether it must also be shown that the aider and abettor too had that intent.

50. Krnojelac argues that, for the crime of persecution, the aider and abettor must have the same guilty discriminatory intent as the principal offenders[69] and that it was not established that he had this intent.[70] The Prosecution disputes the merits of this test and argues that the test identified by the Trial Chamber should be applied, that is, that the aider and abettor must know that the principal offender has the intent to commit the crimes and, in so doing, to discriminate.[71] In the alternative, the Prosecution submits that, should the ground raised by Krnojelac be upheld, the Appeals Chamber should substitute the conviction on count 1 of the Indictment (persecution based on imprisonment) with another on count 11 (imprisonment as a crime against humanity).[72]

51. The Appeals Chamber draws attention to the distinction between the mental element required for aiding and abetting and that required for co-perpetration. In the case of aiding and abetting, the requisite mental element is knowledge that the acts committed by the aider and abettor

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[67] Judgment, para. 169.
[68] Judgment, para. 490.
[69] Defence Brief, paras. 132 to 136. NB: The *Kordić* Judgement shares this view, although this is not always so in the case-law.
[70] *Ibid.*, paras. 137 to 147 and 150.
[71] Prosecution Response, paras. 3.24 to 3.25 and 3.27 to 3.43.
[72] *Ibid.,* paras. 3.44 to 3.48.

PURL: https://www.legal-tools.org/doc/46d2e5/

further the perpetration of a specific crime by the principal offender. In the case of co-perpetration, the intent to perpetrate the crime or to pursue the joint criminal purpose must be shown.[73] The Appeals Chamber also recalls that in the *Aleksovski* Appeals Judgement it followed the *Furundžija* Judgement and held that "it is not necessary to show that the aider and abettor shared the *mens rea* of the principal, but it must be shown that […] the aider and abettor was aware of the essential elements of the crime which was ultimately committed by the principal."[74] The Appeals Chamber also stated that "the aider and abettor [must be aware] of the essential elements of the crime committed by the principal (including his relevant *mens rea*)." The Appeals Chamber notes that no cogent reason was given which would justify this case-law being amended.[75]

52. The Appeals Chamber considers that the aider and abettor in persecution, an offence with a specific intent, must be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory intent of the perpetrators of that crime. He need not share the intent but he must be aware of the discriminatory context in which the crime is to be committed and know that his support or encouragement has a substantial effect on its perpetration. The Appeals Chamber points out that this is the very criterion applied by the Trial Chamber in this case in paragraphs 489 and 490 of the Judgment. The Appeals Chamber states that the third sub-ground of Krnojelac's second ground of appeal is also therefore ill-founded.

53. Accordingly, the Appeals Chamber dismisses the second ground of appeal.

B. Krnojelac's fifth ground of appeal: superior responsibility for the beatings inflicted on detainees

54. Krnojelac submits that the Trial Chamber erred in finding him guilty of inhumane acts and cruel treatment based on beatings as a superior within the meaning of Article 7(3) of the Statute.[76] He asks the Appeals Chamber to overturn the convictions on counts 5 and 7 of the Indictment.[77]

55. Generally, Krnojelac argues that the Trial Chamber erred in concluding that he knew that beatings were being inflicted on the detainees. He challenges the three main parts of the evidence discussed below on which the Trial Chamber relied in determining whether he had the requisite

[73] See *Tadić* Appeals Judgement, para. 229.
[74] *Aleksovski* Appeals Judgement, para. 162.
[75] *Ibid*., para. 107. See also para. 109: "It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts."
[76] Defence Brief, para. 188.
[77] *Ibid*., para. 207.

PURL: https://www.legal-tools.org/doc/46d2e5/

knowledge. The Appeals Chamber observes that the Defence makes a number of submissions, including allegations of contradictions and errors in the Trial Chamber's reasoning with respect to these three parts of the evidence. It should be noted that, in accordance with the applicable review criteria for errors on appeal,[78] the Appeals Chamber will deal only with submissions which satisfy the burden of proof on appeal and not with those which merely seek to contradict the Trial Chamber's findings.

1. Beatings inflicted on Ekrem Zeković

56. The Defence challenges paragraph 309 of the Judgment in which the Trial Chamber did not accept as credible Krnojelac's assertion that he did not witness Zeković being beaten or see any marks or indication which might have led him to conclude that he might have been beaten. The Defence especially challenges the Trial Chamber's finding that:

> […] the Accused intervened to stop the beating of Zeković by one of the KP Dom guards. This guard, Milenko Burilo, continued to attack Zeković while being taken away by the Accused. At some point, Burilo threw Zeković against a wall as a result of which the latter lost consciousness. The evidence of the Accused on that point does not cause the Trial Chamber to have any reasonable doubt that Zeković was telling the truth.[79]

In essence, the Defence argues that "the Trial Chamber established that this incident happened on 8 or 9 July 1993, namely at [a] time when [Krnojelac] was no longer, even formally, warden of the KPD."[80] The Defence claims that superior responsibility could therefore not be attributable to Krnojelac.[81]

57. Contrary to the Defence's assertions, the Appeals Chamber sees no contradiction or inconsistency in the Trial Chamber's findings. In paragraph 96 of the Judgment the Trial Chamber notes that: "[Krnojelac] was, by his own admission, warden of the KP Dom prison facility from 18 April 1992 until the end of July 1993." It further stated that "[Krnojelac] gave evidence that he ceased working at the KP Dom at the end of July 1993."[82] Since the beatings were inflicted on Zeković on 9 July 1993, that is several weeks before he ceased to be warden, it is not unreasonable for the Trial Chamber to hold that Krnojelac was prison warden at the material time.

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[78] See para. 4 and subsequent paragraphs of this Judgement.
[79] Judgment, para. 309 (footnotes omitted).
[80] Defence Brief, para. 193.
[81] *Ibid*., para. 198.
[82] Judgment, para. 96, footnote 262.

PURL: https://www.legal-tools.org/doc/46d2e5/

2. Krnojelac knew that beatings were taking place

58. The Defence contends that, in paragraph 310 of the Judgment, the Trial Chamber erroneously relied on the fact that several of the detainees had informed Krnojelac of the beatings in order to conclude that he was aware of them.[83] It states that "[i]t is logical that what the detainees told the Accused need not have been necessarily true, or that the Accused was bound to accept that without any reservation or doubt. […] [Moreover,] [t]here is not a single reliable [piece of] evidence of such issues and the Defence is of the opinion that the Trial Chamber cannot take this example as proof that the Accused had learned of these beatings."[84] The Defence further argues that the examples given of alleged sounds indicative of beatings reported to Krnojelac date from the period when Krnojelac had just begun working at the KP Dom.

59. The Appeals Chamber considers that the question for the Trial Chamber was not whether what was reported to Krnojelac was in fact true but whether the information he received from the detainees was enough to constitute "alarming information" requiring him, as superior, to launch an investigation or make inquiries. In this instance, the Defence failed to show that the Trial Chamber's finding on this point was unreasonable. Furthermore, the fact that Krnojelac had just begun working at the KP Dom cannot reasonably be said to be a factor mitigating his duty to investigate or his responsibility.

3. Visible traces of beatings on the detainees

60. The Defence points to the following inconsistencies:

- the Trial Chamber itself found that some of the detainees already had traces of blows when they arrived at the KP Dom and it therefore erred in concluding from this that Krnojelac must therefore have known that the detainees were being beaten in the camp;[85]
- a great number of witnesses for the Prosecution stated that the beatings usually took place mostly and almost exclusively in the evening when, according to their testimony, Krnojelac was not in the KP Dom.[86]

61. The Appeals Chamber considers that the first allegation by no means proves that the Trial Chamber's finding in paragraph 311 of the Judgment is wrong. The Appeals Chamber notes the

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[83] Defence Brief, para. 197.
[84] *Ibid*., para. 198.
[85] *Ibid*., para. 200.
[86] *Ibid*., para. 201.

PURL: https://www.legal-tools.org/doc/46d2e5/

Trial Chamber's finding that "[t]he consequences of the mistreatment upon the detainees, the *resulting* difficulties that some of them had in walking, and the pain which they were in must have been obvious to everyone."[87] The fact that some of the detainees had injuries when they arrived does not make the Trial Chamber's finding unreasonable.

62. As regards the second allegation, the Appeals Chamber recalls that what is important is what Krnojelac saw when he was at the KP Dom. It is not unreasonable for a Trial Chamber to hold that Krnojelac had sufficient information to put him on notice that beatings were being given and that the guards of the KP Dom were involved in giving them.[88]

63. This ground of appeal must therefore be dismissed.

[87] Judgment, para. 311 (emphasis added).
[88] See, in particular, paragraph 318 of the Judgment.

PURL: https://www.legal-tools.org/doc/46d2e5/

IV. THE PROSECUTION'S APPEAL

A. The Prosecution's first ground of appeal: definition of participation in a joint criminal enterprise and its application in this instance

64. The first ground of appeal raised by the Prosecution alleges errors of law in the Trial Chamber's definition of the constituent elements of participation in a joint criminal enterprise[89] and in the application of this definition to the facts of the case. The Prosecution considers that, had the definition of joint criminal enterprise been applied correctly, Krnojelac would have been found guilty as a co-perpetrator and not as an aider and abettor to the crimes of persecution (imprisonment and inhumane acts) and cruel treatment (living conditions), pursuant to counts 1 and 15 of the Indictment. The Prosecution therefore asks for the verdict to be amended and the sentence increased.[90]

1. Alleged errors of law in the definition of participation in a joint criminal enterprise

65. The Prosecution relies on the definition of participation in a joint criminal enterprise as a form of "commission" within the meaning of Article 7(1) of the Statute as set out in the *Tadić* Appeals Judgement. It argues that this was followed in the *Krstić* and *Kvočka* Judgements,[91] while conceding that certain first instance decisions do not follow it.[92] According to the Prosecution, the "commission" of a crime under Article 7(1) of the Statute means not only that the accused actively committed the various constituent elements of the crime but also that he committed them with others as co-perpetrator, through participation in a joint criminal enterprise.[93]

66. The Prosecution submits that the Trial Chamber committed four errors of law in defining the elements of responsibility arising from participation in a joint criminal enterprise.

(a) Identification of a third category of "participant"

67. The Prosecution maintains that the Trial Chamber committed an error of law when it classified the responsibility of a participant in a joint criminal enterprise as a form of "accomplice liability" distinct from the commission of the crime.[94] According to the Prosecution, this approach

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[89] On this point the Prosecution Notice of Appeal refers, in particular, to paragraphs 72 and 73 of the Judgment (Prosecution Notice of Appeal, p. 2).
[90] Prosecution Notice of Appeal, p. 3.
[91] Prosecution Brief, paras. 2.3 to 2.8.
[92] *Ibid.*, para. 2.9. The Prosecution specifically quotes *The Prosecutor v. Brđanin and Talić,* Decision on Motion by Tihomir Talić for Provisional Release, case no. IT-99-36-T, Trial Chamber II, 28 March 2001, paras. 42 to 43.
[93] Prosecution Brief, para. 2.4, referring to the *Tadić* Appeals Judgement and para. 2.10.
[94] *Ibid.*, para. 2.14.

PURL: https://www.legal-tools.org/doc/46d2e5/

is tantamount to finding three types of responsibility: the principal offender who physically commits the crime, the co-perpetrator who participates in the joint criminal enterprise without physically committing it and the aider and abettor who knowingly contributes to the criminal enterprise without sharing the intent.[95] The Prosecution argues that this distinction between the principal offender and the co-perpetrator runs contrary to the *Tadić* Appeals Judgement, which does not differentiate between those who perform the *actus reus* of the crime and those who significantly contribute to it and share the intent.[96] The Prosecution also challenges the Trial Chamber's findings in paragraphs 75 to 77 of the Judgment which, in the Prosecution's view, provides that it is not necessary to distinguish between the different types of participant in the crime when it comes to sentencing.[97]

68. In support of its argument, the Prosecution refers to paragraph 77 of the Judgment, of which the relevant part of the authoritative English version reads as follows:

> [...] This Trial Chamber, moreover, does not, with respect, accept the validity of the distinction which Trial Chamber I has sought to draw between a co-perpetrator and an accomplice. This Trial Chamber prefers to follow the opinion of the Appeals Chamber in *Tadić*, that the liability of the participant in a joint criminal enterprise who was not the principal offender is that of an accomplice. For convenience, however, the Trial Chamber will adopt the expression "co-perpetrator" (as meaning a type of accomplice) when referring to a participant in a joint criminal enterprise who was not the principal offender.[98]

69. Krnojelac contends that this submission is mere speculation since he was not found guilty as a participant in a joint criminal enterprise but as an aider and abettor. He adds that, even if the Prosecution's theoretical submissions with regard to the joint criminal enterprise are valid, it has not been proved that he shared the intent of the participants in the joint criminal enterprise and therefore, if the Prosecution's argument is accepted, he should be found guilty as a co-perpetrator.[99] In reply to this argument the Prosecution states that "this issue was raised for the purpose of having an erroneous legal finding corrected by the Appeals Chamber, and did not strictly relate to the Respondent's conduct and the crimes attributed to him."[100]

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[95] *Ibid.*, para. 2.11, referring to para. 73 of the Judgment, footnote 236 and para. 2.13.
[96] *Ibid.*, para. 2.11, referring to para. 73 of the Judgment, and para. 2.14.
[97] *Ibid.*, para. 2.13.
[98] Emphasis added. The corresponding section of the French version of the Judgment reads as follows: "[…] En outre, la présente Chambre conteste la validité de la distinction que la Chambre de première instance I a tenté d'établir entre un co-auteur et un complice. Elle préfère suivre l'avis de la Chambre d'appel *Tadić*, pour laquelle le participant à une entreprise criminelle commune qui n'était pas l'auteur principal est responsable au même titre qu'un complice. Cependant, par commodité, la Chambre de première instance adoptera le terme "coauteur" (au sens de *accomplice)* lorsqu'elle parlera d'un participant à une entreprise criminelle commune qui n'était pas l'auteur principal".
[99] Defence Response, para. 16.
[100] Prosecution Reply, para. 2.3.

PURL: https://www.legal-tools.org/doc/46d2e5/

70. The Appeals Chamber considers that the Prosecution's argument raises the question of the meaning given to the term *accomplice* by the Trial Chamber. The Appeals Chamber notes first of all that, in the case-law of the Tribunal, even within a single judgement, this term has different meanings depending on the context and may refer to a *co-perpetrator* or an *aider and abettor*.[101]

71. The Appeals Chamber notes that, although the French version of the *Tadić* Appeals Judgement faithfully reflects the meaning given by the Appeals Chamber to the term *accomplice* depending on the context, the same cannot be said of the French version of the Judgment under appeal. Thus, in paragraph 77 of the French version of the Judgment, even though footnote 230 specifies that an *accomplice* in a joint criminal enterprise is a person who shares the intent to carry out the enterprise and whose acts facilitate the commission of the agreed crime,[102] the term *accomplice* was translated by *complice* instead of *coauteur* in the body of the paragraph.

72. The Appeals Chamber will now consider the question whether or not the Trial Chamber erred in its use of the terms *accomplice* and *co-perpetrator*, that is *"coauteur"*, with regard to the participants in a joint criminal enterprise other than the principal offender. The Appeals Chamber notes that, in so doing, the Trial Chamber used the terminology of the *Tadić* Appeals Judgement. The Trial Chamber noted in paragraph 77 of the Judgment under appeal that "for convenience […] the Trial Chamber will adopt the expression '*co-perpetrator*' (as meaning a type of *accomplice*) when referring to a participant in a joint criminal enterprise who was not the principal offender." Footnote 230 then clarifies that an *accomplice* in a joint criminal enterprise is a person who shares the intent to carry out the enterprise and whose acts facilitate the commission of the agreed crime. The Appeals Chamber holds that the Trial Chamber has not therefore erred in its use of the terms *accomplice* and *co-perpetrator*.

73. The Appeals Chamber will next consider whether or not the Trial Chamber committed an error of law in deciding that the notion of "commission" within the meaning of Article 7(1) of the

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[101] Thus, the *Tadić* Appeals Judgement concludes in paragraph 220 that: "[...] the notion of common design as a form of accomplice liability is firmly established in customary international law [...]." This sentence was correctly translated in the French version of the Appeals Judgement as: "[...] la notion de dessein commun en tant que forme de responsibilité au titre de coauteur est fermement établie en droit international coutumier [...]". In fact, given the context of the passage, the Appeals Chamber is clearly referring to this notion in the sense of co-perpetrator. In contrast, in paragraph 229(ii) of the Appeals Judgement, the term "*accomplice*" is clearly used in the sense of *aider and abettor* and was translated as such: "in the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan, or agreement is required: indeed, the principal may not even know about the accomplice's contribution," which, in the French version of the Appeals Judgement, is: "Dans le cas du complice, il n'est pas nécessaire de prouver l'existence d'un projet concerté et, *a fortiori*, la formulation préalable d'un tel plan. Aucun projet ou accord n'est nécessaire; d'ailleurs, il peut arriver que l'auteur principal ne sache rien de la contribution apportée par son complice".

[102] Footnote 230 also refers to *Furundžija* Judgement, paras. 245 and 249 and *Kupreškić* Judgement, para. 772 and to *Tadić* Appeals Judgement, para. 229 and *Furundžija* Appeals Judgement, para. 118.

PURL: https://www.legal-tools.org/doc/46d2e5/

Statute must be reserved for the principal perpetrator of the crime. Although it considered that "the seriousness of what is done by a participant in a joint criminal enterprise who was not the principal offender is significantly greater than what is done by one who merely aids and abets the principal offender,"[103] the Trial Chamber held that the term "committed" did not apply to a participant in a joint criminal enterprise who did not personally and physically commit the crime. On this point, the relevant passage of the Judgment is in paragraph 73 and reads as follows in the authoritative English version:

> […] The Prosecution has sought to relate the criminal liability of a participant in a joint criminal enterprise who did not physically commit the relevant crime to the word "committed" in Article 7(1), but this would seem to be inconsistent with the Appeals Chamber's description of such criminal liability as a form of accomplice liability [footnote, referring to *Tadić* Appeals Judgement, para. 192] and with its definition of the word "committed" as "first and foremost the physical perpetration of a crime by the offender himself" [footnote, referring to *Tadić* Appeals Judgement, para. 188]. For convenience, the Trial Chamber proposes to refer to the person who physically committed the relevant crime as the "principal offender".[104]

Unlike the Trial Chamber, the Appeals Chamber does not consider that the Prosecution's submission is contrary to the *Tadić* Appeals Judgement. The Appeals Chamber notes that paragraph 188 of the *Tadić* Appeals Judgement, partially quoted by the Trial Chamber, reads as follows:

> This provision [Article 7(1) of the Statute] covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. However, <u>the commission[105] of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose</u>.

The Appeals Chamber accepts the Prosecution submission as justified and points out that it has since been upheld in the *Ojdanić* case. The Chamber views participation in a joint criminal enterprise as a form of "commission" under Article 7(1) of the Statute. For more detail on this point, the Appeals Chamber refers to the section of this Judgement on the applicable law.[106]

74. However, the Appeals Chamber considers that the Trial Chamber's error is not such as to render the Judgment invalid and notes that the Prosecution is asking only for the erroneous legal findings on this point to be corrected.

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[103] Judgment, para. 75.
[104] Given the context, the French version of this extract from the Judgment incorrectly translated the term "*accomplice liability*" by "*responsabilité du complice"*. This version reads as follows: "L'Accusation a essayé de relier la responsabilité pénale d'un participant à l'entreprise criminelle commune qui n'a pas commis personnellement et matériellement le crime en question au terme 'commis' figurant à l'article 7 1) du Statut; cette approche semblerait toutefois en contradiction avec l'analyse de la Chambre d'appel, qui voit dans cette responsabilité une variante de la responsabilité du complice, ainsi qu'avec la définition du terme 'commis' ('d'abord et avant tout la perpétration physique d'un crime par l'auteur lui-même'). Par commodité la Chambre de première instance se propose d'appeler 'auteur principal' la personne qui a matériellement commis le crime en question".
[105] It should be noted that the authoritative English version uses the term "commission".
[106] See paras. 28 to 32 of this Judgement.

PURL: https://www.legal-tools.org/doc/46d2e5/

75. Finally, the Appeals Chamber will consider the Prosecution submission on the Trial Chamber's findings in paragraphs 75 and 77 of the Judgment relating to whether or not a distinction must be made between the principal offender and the other participants in a joint criminal enterprise when determining the sentence. The Trial Chamber considered that such a distinction was not necessary when assessing the maximum sentence to be passed on each individual.[107] It emphasised that the sentence should reflect the serious nature of the acts whatever their classification and that there were circumstances in which a participant in a joint criminal enterprise might deserve a higher sentence than the principal offender.[108] It also stated that the acts of a participant in a joint criminal enterprise are more serious than those of an aider and abettor to the principal offender since a participant in a joint criminal enterprise shares the intent of the principal offender whereas an aider and abettor need only be aware of that intent. The Appeals Chamber considers that the Prosecution did not show those findings to be erroneous.

(b) Erroneous conflation of the first two categories of joint criminal enterprise

76. The error alleged here covers two objections with regard to paragraph 81 of the Judgment. The Prosecution submits firstly that the Trial Chamber erred in law by conflating the first two categories of joint criminal enterprise into a single category.[109]

77. Paragraph 81 of the Judgment reads as follows:

> A person participates in that joint criminal enterprise either:
>
> (i) by participating directly in the commission[110] of the agreed crime itself (as a principal offender);
>
> (ii) by being present at the time when the crime is committed, and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit[111] that crime; or
>
> (iii) by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of the nature of that system and intent to further that system.

78. The Prosecution maintains that this wording does not cover the entire range of criminal actions set out in the definition of the first two categories of joint criminal enterprise given in the *Tadić* Appeals Judgement. It holds that the wording of paragraph 81 requires that a participant in the joint criminal enterprise who is absent at the time of the facts should belong to a criminal

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[107] Judgment, paras. 74 and 75.
[108] *Ibid.,* paras. 75 to 77.
[109] Prosecution Brief, para. 2.15.
[110] It should be noted that the English version uses the term "commission".
[111] It should be noted that the English version uses the term "to commit".

PURL: https://www.legal-tools.org/doc/46d2e5/

system. If the criminal enterprise cannot be characterised as a system, an individual, for example a political leader, who played an important role in organising and planning a joint criminal enterprise but who was absent at the time of the facts, cannot be held liable. The Prosecution states that, according to the *Tadić* Appeals Judgement, two of the elements of the *actus reus* required for a joint criminal enterprise are (1) a plurality of persons and (2) a joint criminal design. That a system existed was envisaged only in relation to the second form of joint criminal enterprise identified on the basis of cases which relied on a "system of ill-treatment" and is not a general condition applicable to other forms of joint criminal enterprise.

79. Generally, Krnojelac objects to the Trial Chamber's having conflated these two forms of liability. He also states that the second form of liability, linked to the existence of a system, is presented in the *Tadić* Appeals Judgement as a variant of the first, specific to the concentration camp cases tried after the Second World War, and must not be applied to other detention camp cases such as this.[112] The Prosecution replies that this Defence submission is unfounded and was clearly rejected in the *Kvočka* Judgement, which referred to events occurring in a detention camp in the context of the conflict in the former Yugoslavia.[113]

80. The Appeals Chamber notes that, in paragraphs 80 and 81 of the Judgment under appeal, the Trial Chamber defines the basic forms of joint criminal enterprise.[114] The Appeals Chamber observes that, in paragraph 80 of the Judgment, the Trial Chamber defines the understanding which characterises a joint criminal enterprise and, in paragraph 81, lists the types of conduct which it considers characterise the different forms of participation in a joint criminal enterprise. The Appeals Chamber understands, moreover, that in this list the Trial Chamber intends to identify all the forms of participation in a joint criminal enterprise. The Appeals Chamber finds that the Prosecution's objection that the Trial Chamber arbitrarily conflated the first two forms of participation in a joint criminal enterprise is unfounded. The three forms of participation described by the Chamber are clearly alternatives in view of the use of the word "either" in the sentence – "A person participates in that joint criminal enterprise either:" – and the Trial Chamber goes on to set out the different forms of participation.

81. The Appeals Chamber will now consider the Prosecution's second objection relating to the Trial Chamber's use of the words "by being present at the time when the crime is committed" in the second form of participation set out in sub-paragraph (ii). The Appeals Chamber notes that, in

[112] Defence Response, paras. 17 to 25.
[113] Prosecution Reply, para. 2.4.
[114] See, in particular, the Trial Chamber's explanations in paragraph 78 of the Judgment.

PURL: https://www.legal-tools.org/doc/46d2e5/

accordance with its decision in the *Tadić* Appeals Judgement, once a participant in a joint criminal enterprise shares the intent of that enterprise, his participation may take the form of assistance or contribution with a view to carrying out the common plan or purpose. The party concerned need not physically and personally commit the crime or crimes set out in the joint criminal enterprise. The Appeals Chamber considers that the presence of the participant in the joint criminal enterprise at the time the crime is committed by the principal offender is not required either for this type of liability to be incurred.

82. The Appeals Chamber considers that the Judgment contains an obvious contradiction in this respect between subparagraph (ii) of paragraph 81 and footnote 236 to the following paragraph, which reads as follows:

> Decision on Form of Second Amended Indictment, 11 May 2000. In that decision, the direct participant in the joint criminal enterprise, i.e. the person who physically perpetrates the crime, is referred to as a co-perpetrator rather than a perpetrator. Given the ambiguity surrounding the term co-perpetrator engendered by the Prosecution's arguments referred to above, the Trial Chamber prefers to use the term principal offender to make it clear that it is only the person who physically carries out the crime personally that commits that crime. <u>In paragraph (ii), the Trial Chamber refers to a person being present at the time the offence is committed by another. However, presence at the time a crime is committed is not necessary. A person can still be liable for criminal acts carried out by others without being present – all that is necessary is that the person forms an agreement with others that a crime will be carried out</u>.[115]

That decision shows that the list in paragraph 81 of the Judgment is taken entirely from paragraph 15 of the decision with the following difference: footnote 24 to point (ii) of the decision states that "the presence of that person at the time when the crime is committed and a readiness to give aid if required is sufficient to amount to an encouragement to the other participant in the joint criminal enterprise to commit the crime." Consequently, the Appeals Chamber is satisfied that the Trial Chamber sought in its Judgment to correct the list taken from its decision of 11 May 2000 by specifying that a participant in a joint criminal enterprise need not be present at the time the crime is committed by the principal offender. This clarification appears in a footnote and seems to contradict the body of the Judgment. However, the Appeals Chamber is satisfied that this is a drafting error and not an error of law. The Prosecution's ground of appeal is therefore also rejected on this point.

(c) <u>Scope of the common state of mind and required additional agreement</u>

83. The first error of law pleaded by the Prosecution in this regard relates to paragraph 83 of the Judgment. The Prosecution contends that the Trial Chamber committed an error of law when it held that, in order to establish the basic form of joint criminal enterprise, the Prosecution must demonstrate that "each of the persons charged and (if not one of those charged) the principal

PURL: https://www.legal-tools.org/doc/46d2e5/

offender or offenders had a common state of mind, that which is required for that crime." The Prosecution argues that this is not required according to *Tadić*. The Prosecution adds that such an approach could render the notion of joint criminal enterprise redundant in the context of State criminality.[116] It gives as an illustration the example of high-level political and military leaders who, from a distant location, plan the widespread destruction of civilian buildings (hospitals and schools) in a particular area in order to demoralise the enemy without the soldiers responsible for carrying out the attacks sharing the objective in question or even knowing the nature of the relevant targets. The Prosecution argues that, in that context, the Trial Chamber's criterion would make it impossible to implement the concept of joint enterprise.

84. The Appeals Chamber finds that, apart from the specific case of the extended form of joint criminal enterprise, the very concept of joint criminal enterprise[117] presupposes that its participants, other than the principal perpetrator(s) of the crimes committed, share the perpetrators' joint criminal intent. The Appeals Chamber notes that the Prosecution does not put forward any contrary arguments and does not show how this requirement contravenes the *Tadić* Appeals Judgement, as it alleges. The Appeals Chamber also notes that the example given by the Prosecution in support of its argument on this point appears more relevant to the planning of a crime under Article 7(1) of the Statute than to a joint criminal enterprise.

85. The second error of law raised by the Prosecution concerns the Trial Chamber's requirement that a participant in a joint enterprise, who is not a principal offender, must have agreed with the principal offender or offenders to commit the various crimes constituting the joint criminal enterprise. The Prosecution argues that such a requirement is incompatible with the context of a system of ill-treatment as set out in the *Tadić* Appeals Judgement in the second category of cases.[118] The Prosecution submits that a person who holds the highest position of authority in a system where detainees are being ill-treated on discriminatory grounds, who knows that crimes are being committed within it and furthermore contributes to those crimes, cannot be considered a mere aider and abettor to the crimes but must be deemed a co-perpetrator. The Prosecution also contends that the Trial Chamber's approach is tantamount to denying the specific nature of the system and to "slicing" it into unconnected events prior to assessing whether, for each incident or set of events, there existed between the physical perpetrators and the person in authority an agreement, which was not raised in evidence and which was not legally necessary. The Prosecution maintains that, once

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[115] Emphasis added.
[116] Prosecution Brief, paras. 2.22 and 2.23.
[117] This form was identified in the *Tadić* Appeals Judgement as the third category of joint criminal enterprise.

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the accused knowingly and wilfully joins a system of ill-treatment and contributes to it significantly, the relevant "agreement" is either subsumed in or replaced by acceptance of the system as a whole, including its way of functioning and the results over time, as inferred from knowledge of the system of ill-treatment and intent to further it.

86. Krnojelac argues that, "for the sake of [the] basic principles of international criminal justice, it is necessary to precisely assess each and every criminal offence committed during the existence of a joint criminal enterprise because it is the only way to precisely establish [the] criminal liability of accused persons."[119]

87. The Appeals Chamber notes that, in fact, the Prosecution is asking the following two questions:

- Did the Trial Chamber err in law by partitioning the different types of crimes which form the joint criminal enterprise?
- Did the Trial Chamber err in law by requiring proof of an agreement between Krnojelac and the principal perpetrators of the crimes in question?

The Appeals Chamber will examine the questions in turn.

(i) Did the Trial Chamber err in law by partitioning the different types of crimes which form the joint criminal enterprise?

88. The Prosecution alleges that the Trial Chamber partitioned the forms of conduct, which it believed formed part of a system, according to the different categories of crime underpinning the characterisation of persecution.

89. The Appeals Chamber holds that, although the second category of cases defined by the *Tadić* Appeals Judgement ("systemic") clearly draws on the Second World War extermination and concentration camp cases, it may be applied to other cases and especially to the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. Although the perpetrators of the acts tried in the concentration camp cases were mostly members of criminal organisations, the *Tadić* case did not require an individual to belong to such an organisation in order to be considered a participant in the joint criminal enterprise. According to the

[118] Prosecution Brief, paras. 2.24 and 2.25.
[119] Defence Response, para. 40.

PURL: https://www.legal-tools.org/doc/46d2e5/

Tadić Appeals Judgement, this category of cases - a variant of the first - is characterised by the existence of an organised system set in place to achieve a common criminal purpose. For there to be the requisite intent, the accused must have had personal knowledge of the system in question (whether proven by express testimony or a matter of reasonable inference from the accused's position of authority) and the intent to further the concerted system. The Prosecution was therefore able to rely upon this form of joint criminal enterprise.

90. The Appeals Chamber notes from the Judgment that the criticism that the Trial Chamber compartmentalised the types of crime seems justified. The Appeals Chamber points out that the Trial Chamber did conclude that the principal perpetrators of the unlawful imprisonment participated in a "system"[120] but did not subsequently make any express reference to the concept of system when determining whether or not Krnojelac shared the common purpose of the perpetrators of each of the categories of constituent crimes specified in the Indictment. In order to assess whether or not this amounts to an error of law, the Appeals Chamber will now examine this approach contextually by considering which argument appears in the Indictment.

91. The Appeals Chamber notes that the Prosecution initially considered the Accused liable for personally and physically committing the acts constituting the crime of persecution, as indicated by the wording of the initial indictment.[121] Then, in the second amended indictment, the Prosecution charged the Accused for the first time with having participated in the execution of a common plan involving the sum of the acts constituting the crime of persecution.

92. In its Pre-Trial Brief, the Prosecution then referred to the different forms of joint criminal enterprise in relation to the Accused's liability on the count of persecution. It referred initially to the first category of basic joint criminal enterprise set out in the *Tadić* Appeals Judgement with regard to imprisonment, inhumane living conditions, forced labour and deportation based on active participation in the crimes forming part of the common purpose and the failure to prevent or stop them.[122] The Prosecution then referred to the systemic form of joint criminal enterprise, that is to say "a system of repression",[123] as well as to the extended form of criminal enterprise.[124]

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[120] *Ibid*., para. 127.

[121] Initial indictment, para. 5.2. "Milorad Krnojelac persecuted the Muslim and other non-Serb males by subjecting them to prolonged and routine imprisonment and confinement, repeated torture and beatings, countless killings […]".

[122] Prosecution Pre-Trial Brief, para. 49: "Where the common design involved the confinement and enslavement of Muslim and other non-Serb detainees from the Foča area, the Accused participated by administering the venue where such acts took place. As camp commander, Krnojelac was personally responsible for the maintenance of the inhumane conditions at the facility. Krnojelac ordered and supervised the actions of his guards and did nothing to restrain their misconduct. Nor did he do anything to prevent access to detainees by Serb military personnel who would beat and kill detainees. Such omissions encouraged the abuse of detainees. Furthermore, Krnojelac, during his time as a commander,

PURL: https://www.legal-tools.org/doc/46d2e5/

93. However, the Appeals Chamber notes that for the count of persecution, although the Indictment was issued after the Pre-Trial Brief, it relies on the theory of a common purpose with the guards and soldiers who entered the camp. This purpose is defined solely as the sum of the constituent acts charged, that is imprisonment, torture and beatings, killings, forced labour, inhumane conditions, deportation and expulsion. Under count 1 of the Indictment, Milorad Krnojelac is charged with persecuting the Muslim and other non-Serb male civilian detainees on political, racial or religious grounds from April 1992 until August 1993 as camp commander at the Foča KP Dom, together with the KP Dom guards under his command and in common purpose with the guards and soldiers specified elsewhere in the Indictment. The same Indictment describes the joint plan as:

> a) the prolonged and routine imprisonment and confinement within the KP Dom facility of Muslim and other non-Serb male civilian inhabitants of Foča municipality and its environs;
>
> b) the repeated torture and beatings of Muslim and other non-Serb male civilian detainees at KP Dom;
>
> c) numerous killings of Muslim and other non-Serb male civilian detainees at KP Dom;
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> d) the prolonged and frequent forced labour of Muslim and other non-Serb male civilian detainees at KP Dom;
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> e) the establishment and perpetuation of inhumane conditions against Muslim and other non-Serb male civilian detainees within the KP Dom detention facility; and
>
> f) the deportation and expulsion of Muslim and other non-Serb civilians detained in the KP Dom detention facility to Montenegro and other places which are unknown.

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formed and supervised workers' groups made up of detainees who were used for forced labour and selected detainees for deportation to Montenegro […].” See also para. 50: “Thus the Accused's active participation in crimes which made up the persecution, unlawful confinement, inhumane conditions, and enslavement, and his failure to prevent or stop the abuses carried out under the common plan demonstrate that he intended these crimes to take place.”

[123] *Ibid.*, para. 52: “The Accused Krnojelac actively participated in a system of repression against non-Serb civilians through his position as camp commander of KP Dom. Krnojelac prepared or approved lists of detainees to be tortured and beaten and established a daily routine for these beating and torture. He ordered guards to beat detainees for even minor violations of prisons rules, which he himself was responsible for establishing. He subjected non-Serb detainees to collective punishment.” See also para. 56: “Therefore, under the second theory of common purpose liability, criminal responsibility must also attach to the Accused for his involvement in, persecution […].”

[124] See, in particular, *ibid.* para. 60: “In the present case, the Prosecution contends that the KP Dom functioned as a prison-camp in order to carry out the brutal confinement of Muslims and other non-Serb male civilians as part of the broader criminal purpose of ethnically cleansing Foča municipality and the surrounding areas. The Accused Krnojelac participated in this common criminal design by acting as a warden of KP Dom. The evidence will show that during the relevant period time periods described in the Indictment, while the Accused Krnojelac was supervising operations at KP Dom, outsiders frequently entered the camp and harassed, tortured and killed detainees. The crimes committed by these outsiders, even if outside the original common scheme established at KP Dom, were a natural and foreseeable consequence of the execution of this common plan.” See also para. 61: “[…] Even if the very first incidents were not anticipated, over the course of weeks and months, these crimes certainly became foreseeable consequences of the common plan and, indeed, of the Accused's actions in permitting access […].”

PURL: https://www.legal-tools.org/doc/46d2e5/

94. The Appeals Chamber notes that the Trial Chamber clearly followed the approach taken in the Indictment since, for each aspect of the common purpose pleaded by the Prosecution, it sought to determine whether Krnojelac shared the intent of the principal offenders. The Appeals Chamber finds that such an approach corresponds more closely to the first category of joint criminal enterprise than to the second. However, given that the Prosecution did not provide a more suitable definition of common purpose when referring to the systemic form of joint criminal enterprise, this approach does not amount to an error of law.[125] The Appeals Chamber will now consider the second issue raised by this sub-ground of appeal.

(ii) Did the Trial Chamber err in law by requiring proof of an agreement between Krnojelac and the principal perpetrators of the crimes in question?

95. The Appeals Chamber starts by observing that, as the Prosecution alleges, it is apparent from the Judgment that the Trial Chamber required proof of an agreement between Krnojelac and the principal offenders when it assessed whether he could be held personally liable as a participant in the joint criminal enterprise. In so doing, the Trial Chamber held that the Prosecution had to establish (1) that there was an agreement between Krnojelac, the prison guards and the military authorities to subject the non-Serb detainees to the inhumane conditions which constituted inhumane acts and cruel treatment, and that each of the participants in the enterprise, including Krnojelac, shared the intent to commit that crime;[126] and (2) that there was an agreement between Krnojelac and the other participants [guards and soldiers] to persecute the said detainees by way of the underlying crimes found to have been committed, and that the principal offenders and Krnojelac shared the intent required for each of the underlying crimes and the intent to discriminate in their commission.[127]

96. The Appeals Chamber notes that, with regard to the crimes considered within a systemic form of joint criminal enterprise, the intent of the participants other than the principal offenders presupposes personal knowledge of the system of ill-treatment (whether proven by express testimony or a matter of reasonable inference from the accused's position of authority) and the intent to further the concerted system of ill-treatment. Using these criteria, it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system. As the Appeals Chamber recalled in the *Tadić* Appeals Judgement, in

[125] See para. 28 *et seq.* of this Judgement.
[126] Judgment, para. 170.
[127] *Ibid.*, para. 487.

PURL: https://www.legal-tools.org/doc/46d2e5/

his summary of the *Belsen* case the Judge Advocate summed up and approved the Prosecution's legal submissions in the following terms:

> The case for the Prosecution is that all the accused employed on the staff at Auschwitz knew that a system and a course of conduct was in force, and that, in one way or another, in furtherance of a common agreement to run the camp in a brutal way, all those people were taking part in that course of conduct.[128]

97. The Appeals Chamber considers that, by requiring proof of an agreement in relation to each of the crimes committed with a common purpose, when it assessed the intent to participate in a systemic form of joint criminal enterprise, the Trial Chamber went beyond the criterion set by the Appeals Chamber in the *Tadić* case. Since the Trial Chamber's findings showed that the system in place at the KP Dom sought to subject non-Serb detainees to inhumane living conditions and ill-treatment on discriminatory grounds, the Trial Chamber should have examined whether or not Krnojelac knew of the system and agreed to it, without it being necessary to establish that he had entered into an agreement with the guards and soldiers - the principal perpetrators of the crimes committed under the system - to commit those crimes. The Appeals Chamber finds that the extent of this error depends on whether Krnojelac's liability would have been incurred as a co-perpetrator and not as a mere aider and abettor had the *Tadić* Appeals Judgement criterion, that is the determination of his intent based on his knowledge of the system and the fact that he agreed to it, been used instead of the Trial Chamber's criterion that there be an agreement as set out above. If that is the case, there are grounds for considering that the error invalidates the Judgment. Moreover, the Appeals Chamber notes that the second error alleged by the Prosecution relates directly to the Trial Chamber's applying the intent criterion to the facts. Resolving this second issue will also make it possible to reach a finding on the issue of the extent of the Trial Chamber's error. The second alleged error is examined under point (2) of sub-section B below.

2. Application of the law to the facts in this case

98. The Appeals Chamber will first examine the ground pleaded by the Prosecution with regard to the specific crime of persecution based on imprisonment of the non-Serb detainees at the KP Dom and then the ground based on the erroneous application of the intent criterion in the second category of joint criminal enterprise.

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[128] *Belsen* Case, Law Reports, vol. II, p.121, quoted in the *Tadić* Appeals Judgement, footnote 251.

PURL: https://www.legal-tools.org/doc/46d2e5/

(a) <u>Allegation that the Trial Chamber made an erroneous finding with respect to the crime of imprisonment</u>

99. The Prosecution submits that the Trial Chamber erred in law and/or fact when, in considering whether Krnojelac knew that the non-Serb detainees were being imprisoned unlawfully and that his acts or omissions were contributing to the maintenance of the unlawful system by the principal offenders, it held that he could merely have been carrying out orders without sharing the criminal intent of those who had given the orders. The Prosecution argues that the Trial Chamber thus erroneously equated criminal intent with motive and considers that an error of law was committed. The Prosecution argues that there is intent once the accused is aware of the criminal intent of the other co-perpetrators and, guided by such knowledge, voluntarily contributes to that common purpose. The motives of the accused are irrelevant.[129] In support of its argument, the Prosecution cites the Trial Chamber's Judgement in the *Krstić* case. The Prosecution submits that, in any event, even if the Trial Chamber's finding were to be deemed to be fact, it would be groundless.[130] Krnojelac maintains that the Trial Chamber did not err and adds that, while intent remains an important element in law, the motive may clarify the intent.[131]

100. The Appeals Chamber agrees with the Prosecution that shared criminal intent does not require the co-perpetrator's personal satisfaction or enthusiasm or his personal initiative in contributing to the joint enterprise.[132]

101. The Appeals Chamber refers to the relevant passage of the Judgment which reads as follows:

> The Trial Chamber is also not satisfied that the Prosecution has established that the Accused shared the intent of the joint criminal enterprise to illegally imprison the non-Serb detainees. The Trial Chamber has already determined that the Accused knew the imprisonment of the non-Serb detainees was unlawful and it is also satisfied that he knew that his acts and omissions were contributing to the maintenance of that unlawful system by the principal offenders. However, the Trial Chamber is not satisfied that the only reasonable inference which can be drawn from these facts is that the Accused shared the intent of that joint criminal enterprise. In particular, the Trial Chamber does not consider that the Prosecution has excluded the reasonable possibility that the Accused was merely carrying out the orders given to him by those who appointed him to the position of warden of the KP Dom without sharing their criminal intent. In these circumstances, the Trial Chamber is of the view that the criminal conduct of the Accused is most appropriately characterised as that of an aider and abettor to the principal offenders of the joint criminal enterprise to illegally imprison the non-Serb detainees pursuant to Article 7(1) of the Statute.[133]

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[129] Prosecution Brief, paras. 2.36 to 2.38.
[130] *Ibid.,* para. 2.42.
[131] Defence Response, paras. 51 to 54.
[132] Prosecution Brief, para. 2.38.
[133] Judgment, para. 127.

PURL: https://www.legal-tools.org/doc/46d2e5/

102. The Appeals Chamber notes that customary international law does not require a purely personal motive in order to establish the existence of a crime against humanity.[134] The Appeals Chamber further recalls its case-law in the *Jelisić* case which, with regard to the specific intent required for the crime of genocide, sets out "the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide."[135] It is the Appeals Chamber's belief that this distinction between intent and motive must also be applied to the other crimes laid down in the Statute.

103. The Appeals Chamber does not construe the Trial Chamber's assertion in the Judgment that "the Prosecution has [not] excluded the reasonable possibility that the Accused was merely carrying out the orders given to him by those who appointed him to the position of warden of the KP Dom without sharing their criminal intent" to mean that the Trial Chamber confused intent and motive or that it concluded that the existence of a motive, for example the execution of an order, would be incompatible with the intent to participate in the joint criminal enterprise. The Appeals Chamber considers that the Trial Chamber held that the Prosecution had not established the intent beyond all reasonable doubt.

104. Consequently, the Appeals Chamber holds that the error of law pleaded by the Prosecution has not been established. It will now consider whether it was unreasonable for the Trial Chamber to find that intent was not established here by examining the Prosecution's ground of appeal concerning the manner in which the requisite intent for the second form of joint criminal enterprise was applied to the facts.

(b) Erroneous application of the intent criterion to the second category of joint criminal enterprise

105. The Prosecution submits that, in view of the Trial Chamber's own findings,[136] if the law had been applied correctly to the facts of the case, Krnojelac should have been found guilty not as an aider and abettor but as a co-perpetrator of the crimes of persecution (imprisonment and inhumane acts) and cruel treatment (based on living conditions imposed) under counts 1 and 15.[137] The Prosecution accordingly requests the Appeals Chamber to revise the Judgment on this point and

[134] *Tadić* Appeals Judgement, para. 270.
[135] *Jelisić* Appeals Judgement, para. 49. See also the *Kunarac* Appeals Judgement, paras. 103 and 153.
[136] Prosecution Brief, para. 2.32, referring to paras. 116 to 124, 128 to 168, 308 to 311 and 488 to 492 of the Judgment.
[137] Prosecution Brief, para. 2.43. The Prosecution further submits that if its sixth and seventh grounds are upheld, Krnojelac should also be found guilty as a co-perpetrator of persecution, namely forced labour and deportations.

PURL: https://www.legal-tools.org/doc/46d2e5/

submits that, according to the Trial Chamber's own findings, the following were established beyond all reasonable doubt:

- the existence of a system of unlawful detention;

- multiple instances of beatings, inhumane acts and cruel treatment committed within that system, all committed with discriminatory intent;

- Krnojelac's position of authority;

- Krnojelac's knowledge of the system of unlawful detention, of the beatings, inhumane acts and cruel treatment, and of the discriminatory intent behind the commission of these crimes (ill-treatment);

- Krnojelac's intent to facilitate the commission of the crimes as an aider and abettor (implicit in the Trial Chamber's finding that he aided and abetted the relevant crimes).[138]

The Prosecution takes the view that all the constituent elements of the second category of joint criminal liability identified in the *Tadić* Appeals Judgement are therefore satisfied in the Trial Chamber's findings and it was not reasonable to regard him as a mere aider and abettor.[139]

106. Krnojelac argues that the Trial Chamber did not find that he had sufficient authority to have been one of the participants in the joint criminal enterprise.[140] He further contends that, were the Prosecution's submissions to be upheld, there would no longer be any difference between an aider and abettor and a participant in a joint criminal enterprise.[141]

107. The Appeals Chamber will first consider the Trial Chamber's findings on the commission of the relevant crimes by the principal perpetrators, that is: (1) that the establishment and perpetuation of inhumane conditions, constituting inhumane acts and cruel treatment of the non-Serb detainees at the KP Dom, had been carried out with the intent to discriminate against them because of their religious or political affiliations and that, as such, the crime of persecution was established;[142] (2) that the acts of torture, inhumane acts or cruel treatment under paragraphs 5.15 and 5.23 of the Indictment were carried out on discriminatory grounds (FWS-03 only);[143] and (3) that the

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[138] Prosecution Brief, para. 2.33.
[139] *Ibid.,* para. 2.34.
[140] Defence Brief, paras. 44 to 48.
[141] *Ibid.*, para. 49.
[142] Judgment, para. 443.
[143] *Ibid.*, para. 465.

PURL: https://www.legal-tools.org/doc/46d2e5/

deprivation of liberty of the non-Serb detainees at the KP Dom constituted imprisonment within the meaning of Article 5(e) of the Statute.

108. As regards Krnojelac's intent, the Trial Chamber found that he did not share the intent to commit the crimes set out below as part of a joint criminal enterprise:

- *Living conditions constituting inhumane acts*: on the grounds that the Prosecution did not establish that Krnojelac had entered into an agreement with the prison guards and the military authorities to subject the non-Serb detainees to inhumane conditions constituting inhumane acts and cruel treatment or that he had the intent to subject the detainees to inhumane living conditions of this kind while he was warden of the KP Dom.[144] The Trial Chamber did however hold that Krnojelac was aware of the intent of the principal offenders - the guards and military authorities - responsible for the living conditions imposed upon the non-Serb detainees at the KP Dom and that he was aware that his failure to take any action as warden in relation to this knowledge encouraged the principal offenders to maintain those conditions and contributed in a substantial way to their maintenance. The Trial Chamber thus found that Krnojelac incurred criminal responsibility as an aider and abettor to inhumane acts and cruel treatment for having assisted and encouraged the maintenance of living conditions at the KP Dom whilst prison warden.

- *Beatings and acts of torture*: on the grounds that there is no satisfactory evidence that Krnojelac participated in a joint criminal enterprise which consisted of meting out beatings and torture to the non-Serb detainees.[145] The Trial Chamber nevertheless held that Krnojelac knew that beatings and acts of torture were being carried out and that, by failing to take any appropriate measures which, as warden, he was obliged to adopt, he encouraged his subordinates to commit such acts. The Trial Chamber thus found that Krnojelac was responsible as an aider and abettor to the beatings although it considered that, in view of the nature of his participation, the more appropriate basis of liability was his responsibility as a superior.[146]

- *Imprisonment*: On this point the Appeals Chamber refers to the extract from paragraph 127 of the Judgment and the Trial Chamber's findings that, by virtue of his position as prison warden, Krnojelac knew that the non-Serb detainees were being unlawfully detained, had admitted to knowing that they were being detained precisely because they were non-Serbs and

[144] Judgment, para. 487, referring to para. 170.
[145] *Ibid*, para. 487, referring to paras. 313 to 314 and 346. It appears however that the relevant paragraph is para. 315.

PURL: https://www.legal-tools.org/doc/46d2e5/

knew that none of the procedures in place for legally detained persons was ever followed at the KP Dom.[147]

109. In view of the Trial Chamber's findings of fact and the criterion to be applied to determine whether a participant in a system whose common purpose was the persecution (based on imprisonment and inhumane acts) and cruel treatment (based on living conditions imposed) of the non-Serb civilian detainees at the KP Dom had the required intent, the Appeals Chamber will now examine whether no trier of fact could reasonably have concluded that Krnojelac shared the intent of the co-perpetrators of those crimes.

110. The Trial Chamber noted that, by his own admission, Krnojelac was warden of the KP Dom from 18 April 1992 until the end of July 1993, that is for 15 months.[148] It found that Krnojelac had voluntarily undertaken the position of acting warden and then warden until his departure from the KP Dom[149] and that he retained all powers associated with the pre-conflict position of warden during that period.[150] It was noted above that the Trial Chamber established that, by virtue of his position as prison warden, Krnojelac knew that the non-Serb detainees were being unlawfully detained, had admitted to knowing that they were being detained precisely because they were non-Serbs and knew that none of the procedures in place for legally detained persons was ever followed at the KP Dom. It was also established that he was aware of the intent of the principal offenders - the guards and military authorities - responsible for the living conditions imposed on the non-Serb detainees at the KP Dom, knew that beatings and acts of torture were being carried out and that, by failing to take any appropriate measures which, as warden, he was obliged to adopt, he encouraged his subordinates to maintain those conditions and furthered the commission of those acts.

111. The Appeals Chamber holds that, with regard to Krnojelac's duties, the time over which he exercised those duties, his knowledge of the system in place, the crimes committed as part of that system and their discriminatory nature, a trier of fact should reasonably have inferred from the above findings that he was part of the system and thereby intended to further it. The same conclusion must be reached when determining whether the findings should have led a trier of fact

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[146] *Ibid.,* paras. 316 to 320.
[147] *Ibid.*, para. 124.
[148] *Ibid.*, para. 96.
[149] *Ibid.*, para. 99.
[150] *Ibid.*, para. 103. Moreover, the Trial Chamber concluded that Krnojelac had authority over all the subordinate personnel and detainees at the KP Dom and that, while he could exercise only limited control over the activity of the investigators and paramilitaries entering the camp, he was in a position to instruct the investigators to interview detainees of his choosing with a view to their exchange or release and to ensure that the paramilitaries did not remove detainees without the authorisation of their superiors (paras. 105 to 107).

PURL: https://www.legal-tools.org/doc/46d2e5/

reasonably to conclude that Krnojelac shared the discriminatory intent of the perpetrators of the crimes of imprisonment and inhumane acts.[151] As the Trial Chamber rightly recalled, such intent must be established for Krnojelac to incur criminal liability on the count of persecution on this basis.[152]

112. Hence, the Appeals Chamber upholds the Prosecution's ground of appeal and overturns the Trial Chamber's finding that Krnojelac was guilty as an aider and abettor and not a co-perpetrator of persecution (imprisonment and inhumane acts) and cruel treatment (imposed living conditions) under counts 1 and 15 .

113. The Appeals Chamber will now examine the scope of the error of law arising out of the Trial Chamber's requirement of proof of an agreement between Krnojelac and the principal offenders to commit the crimes. The Appeals Chamber set this matter aside until it had determined whether applying the *Tadić* criterion instead of requiring such an agreement should have resulted in Krnojelac being found liable as a co-perpetrator and not an aider and abettor to the facts for which he was held liable under Article 7(1) of the Statute. This is indeed the case, as has just been demonstrated. For this reason, the Appeals Chamber holds that the error of law committed by the Trial Chamber was such as to invalidate the Judgment. Consequently, the Appeals Chamber finds Krnojelac guilty as a co-perpetrator on counts 1 and 15 for the crime of persecution (imprisonment and inhumane acts) and cruel treatment (based on living conditions imposed) .

114. Before considering the Prosecution's second ground of appeal, the Appeals Chamber will examine another issue raised indirectly by the Prosecution's appeal. The Appeals Chamber found earlier that the approach adopted by the Prosecution in its Indictment for defining common purpose corresponded more closely to the first category of joint criminal enterprise than to the second. The Appeals Chamber considers that the issue of which approach appears most appropriate for determining whether liability may be incurred as a co-perpetrator or an aider and abettor by a participant in a "systemic" form of joint criminal enterprise for crimes committed by the principal perpetrator in a context such as the KP Dom is of general importance for the Tribunal's case-law. The Appeals Chamber will therefore examine the issue, limiting itself to acts charged as persecution.

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[151] The Appeals Chamber holds that this is the necessary conclusion even supposing that, as the Trial Chamber found, the Prosecution's allegation according to which Krnojelac's membership of the SDS and support of Serb nationalistic policy was direct evidence of his intent to discriminate against the non-Serb civilian detainees, had not been established (Judgment, para. 487).
[152] Judgment, para. 487.

PURL: https://www.legal-tools.org/doc/46d2e5/

3. Issue of general importance

115. The Appeals Chamber notes first of all that it is for the Prosecution to determine the legal theory which it considers most appropriate to demonstrate that the facts it intends to submit to the Trial Chamber for assessment enable the responsibility of the person charged to be established. The Prosecution may, to that end, additionally or alternatively rely on one or more legal theories, on condition that it is done clearly, early enough and, in any event, allowing enough time to enable the accused to know what exactly he is accused of and to enable him to prepare his defence accordingly.

116. The Appeals Chamber holds that using the concept of joint criminal enterprise to define an individual's responsibility for crimes physically committed by others requires a strict definition of common purpose. That principle applies irrespective of the category of joint enterprise alleged. The principal perpetrators of the crimes constituting the common purpose (civilian and military authorities and/or guards and soldiers present at KP Dom) or constituting a foreseeable consequence of it should also be identified as precisely as possible.

117. In other words, the accused must know whether the system he is charged with having contributed to involves all the acts being prosecuted or only some of them. In the latter case, the Prosecution must specify the basis on which it considers that the responsibility of the accused may be incurred for acts not included in the common purpose of the participants in the system (physical commission, participation in another joint criminal enterprise whose principal offenders and common purpose must be identified). It would contravene the rights of the defence if the Trial Chamber, seised of a valid shifting indictment where the Prosecution has not stated the theory or theories it considered most likely to establish the accused's responsibility within accepted time-limits, chose a theory not expressly pleaded by the Prosecution.

118. The Appeals Chamber holds that the search for the common denominator in its evidence should have led the Prosecution to define the common purpose of the participants in the system in place at the KP Dom from April 1992 to August 1993 as limited only to the acts which sought to further the unlawful imprisonment at the KP Dom of the mainly Muslim, non-Serb civilians on discriminatory grounds related to their origin and to subject them to inhumane living conditions and ill-treatment in breach of their fundamental rights.[153] The system worked because the camp staff

[153] The Appeals Chamber refers, in particular, to the following findings of fact: Judgment, para. 36: "Non-Serbs were arrested throughout the municipality of Foča. […]"; para. 40: "On 17 April 1992, all the male Muslim civilians detained at Livade [at the Territorial Defence's warehouses] were transferred to the KP Dom, which had served as a prison prior to the conflict. At this time, soldiers from the Užice Corps in Serbia were running the facility, the control of which was

PURL: https://www.legal-tools.org/doc/46d2e5/

and the military personnel who were involved in committing the crimes or who assisted the perpetrators were aware that the KP Dom facility had stopped operating as an ordinary prison when the Serb authorities arbitrarily incarcerated non-Serb civilians there following the fall of the town of Foča. From that point on, in the minds of the participants, the KP Dom had become a system for subjecting the mainly Muslim, non-Serb civilian detainees to inhumane living conditions and ill-treatment in breach of their fundamental rights on discriminatory grounds related to their origin.

119. Additionally, it is undeniable that the decision arbitrarily to arrest the region's male, non-Serb civilians, imprison them at the KP Dom and then deport them from the region, or even physically eliminate some of them, must be linked to the criminal purpose of ethnically cleansing the Foča region pursued by some of its military and civilian authorities.[154] This does not necessarily mean that all the co-perpetrators responsible for the living conditions and ill-treatment inflicted upon the non-Serb detainees at the KP Dom intended to take part in the ethnic cleansing of the

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transferred to local Serbs during the course of the following few weeks"; para. 41: "The illegal arrest and imprisonment of non-Serb civilian males was carried out on a massive scale and in a systematic way. Hundreds of Muslim men, as well as a few other non-Serb civilians, were detained at the KP Dom without being charged with any crime. At all times from the end of the fighting until the end of 1994, up to several hundred Muslim civilian men were thus arbitrarily interned at the KP Dom. They were detained there for periods lasting from four months to more than two and a half years"; para. 43: "The conditions under which non-Serbs were detained were below any legal standard regulating the treatment of civilians in times of armed conflict [insufficient food causing weight loss of up to a third of their weight, extremely cold solitary confinement cells during the winter of 1992, and confiscation by the guards of the clothes they made]"; para. 44: "Hygienic conditions were deplorable and washing facilities minimal. […] At least one detainee died as a result of the lack of or late medical care"; para. 45: "Non-Serb detainees were locked up in their rooms for most of the day, being allowed out only to go to the canteen and back. Some, however, were taken out to work knowing that they would receive additional and much needed food if they did"; para. 46: "Many of the detainees were subjected to beatings and other forms of mistreatment, sometimes randomly, sometimes as a punishment for minor breaches of the prison regulations or in order to obtain information or a confession from them. The screams and moans of those being beaten could be heard by other detainees, instilling fear among all detainees. Many were returned to their rooms with visible wounds and bruises resulting from the beating. Some were unable to walk or talk for days"; para. 47: "The few Serb convicts who were detained at the KP Dom were kept in a different part of the building from the non-Serbs. They were not mistreated like the non-Serb detainees. The quality and quantity of their food was somewhat better, sometimes including additional servings. They were not beaten or otherwise abused, they were not locked up in their rooms, they were released once they had served their time, they had access to hygienic facilities and enjoyed other benefits which were denied to non-Serb detainees."

[154] The Appeals Chamber refers to this point in para. 44 of the Prosecution Pre-Trial Brief and notes that the Trial Chamber accepted this analysis as demonstrating the following finding of fact: "The detention of non-Serbs in the KP Dom, and the acts or omissions which took place therein, were clearly related to the widespread and systematic attack against the non-Serb civilian population in the Foča municipality." (Judgment, para. 50). Moreover, the Trial Chamber unmistakably linked the expulsion, exchange or deportation of the non-Serbs detained at the KP Dom to the ethnic cleansing operation:

"The expulsion, exchange or deportation of non-Serbs, both detainees at the KP Dom and those who had not been detained, was the final stage of the Serb attack upon the non-Serb civilian population in Foča municipality. Initially there was a military order preventing citizens from leaving Foča. However, most of the non-Serb civilian population was eventually forced to leave Foča. In May 1992, buses were organised to take civilians out of town, and around 13 August 1992 the remaining Muslims in Foča, mostly women and children, were taken away to Rožaje, Montenegro. […] In late 1994, the last remaining Muslim detainees at the KP Dom were exchanged, marking the end of the attack upon those civilians and the achievement of a Serbian region ethnically cleansed of Muslims. By the end of the war in 1995, Foča had become an almost purely Serb town. Foča was renamed 'Srbinje' after the conflict, meaning 'Serb town'." (Judgment para. 49).

PURL: https://www.legal-tools.org/doc/46d2e5/

region or were even aware of it at the time that they were physically committing the crimes and/or furthering the system in place.[155]

120. Accordingly, the Appeals Chamber finds that the most appropriate approach in this case would have been to limit the definition of the common purpose within the KP Dom "system" to the commission of those crimes which, given the context and evidence adduced, could be considered as common to all the offenders beyond all reasonable doubt. This amounts to selecting the common denominator discussed above. As for the crimes which do not plainly fit into the common purpose of this system, the Prosecution should, at least as an alternative, have stated on what basis it considered that the responsibility of the Accused could be established. The Appeals Chamber suggests that the following approach could be considered.

121. For alleged crimes, such as the killings, which albeit committed at the KP Dom clearly go beyond the system's common purpose, liability may be imputed to a person participating in the system for crimes of this kind committed by another participant if it was foreseeable that a crime of this sort was likely to be committed by that other participant and the former willingly took the risk (or was indifferent to it). The Appeals Chamber notes that this was the Prosecution's submission in the Pre-Trial Brief with respect to the killings.[156]

122. For alleged crimes which, whilst implicating several co-perpetrators at the KP Dom, do not appear beyond all reasonable doubt to constitute a purpose common to all the participants in the system, they should be considered as coming under a first category joint criminal enterprise without reference to the concept of system. The Appeals Chamber holds that the alleged crime of forced labour must be dealt with in this way. A person who participated in its commission may be regarded as a co-perpetrator of a joint criminal enterprise whose purpose was to commit the crime, provided that the individual concerned shared the common intent of the principal offenders. Alternatively, the individual concerned may be considered an aider and abettor if he merely had knowledge of the perpetrators' intent and lent them support which had a significant effect on the perpetration of the crime.

123. For alleged crimes which fit into a broader plan, such as imprisonment and deportation, they should be distinguished on the basis of whether they form part of the common purpose of all the participants in the system and other co-perpetrators outside of it or whether they form part of a

[155] While some of the principal offenders responsible for the alleged beatings and acts of torture were military personnel supposed to have closer links with the military authorities, others were guards or other administrative personnel from the camp.

[156] See the section in this Judgement dealing with the second ground of appeal.

PURL: https://www.legal-tools.org/doc/46d2e5/

common purpose shared by only some of the participants in the system and the persons outside that system. In the first case, into which the crime of imprisonment falls, the concept of system may be applied to all the participants. However, the distinctive nature of the crimes stems from the fact that some of the principal offenders are persons outside the system in place at the camp, that is, in the case of imprisonment, certain civilian and/or military authorities who ordered the arbitrary arrests and detention at the KP Dom. In the second case, into which the deportation or transfer of some of the non-Serb detainees falls, the crimes in question should be considered without applying the concept of system and a person who participated in their commission may be regarded as a co-perpetrator of a joint criminal enterprise whose purpose was to commit the crimes, provided that the individual concerned shared the common intent of the principal offenders. Alternatively, the individual concerned may be considered an aider and abettor if he merely had knowledge of the perpetrators' intent and lent them support which had a significant effect on the perpetration of the crimes.

124. The Appeals Chamber will now consider the Prosecution's second ground of appeal relating to the form of the Indictment.

B. The Prosecution's second ground of appeal: the form of the Indictment

125. The Prosecution maintains that the Trial Chamber committed an error of law when it found that the Accused could not be held liable under the third form of joint criminal enterprise set out in the *Tadić* Appeals Judgement with respect to any of the crimes alleged unless an "extended" form of joint criminal enterprise was pleaded expressly in the Indictment.[157] The Prosecution does not ask for the Trial Judgment to be reversed or revised on the point. It raises this ground of appeal on account of its general significance for the case-law of the Tribunal.[158]

126. The Prosecution claims that the requirement under Article 18(4) of the Statute and Rule 47(C) of the Rules that an indictment set out in detail the crimes with which the accused is charged does not require the specific "mode of [the accused's] liability" to be set out.[159] It contends that, in any event, failure to do so could not render the indictment null and void. In support of that submission, the Prosecution argues that, in the *Tadić* Appeals Judgement, the Appeals Chamber found the accused liable under the third form of joint criminal enterprise for the killing of five men

[157] Prosecution Brief, paras. 3.1 to 3.15.
[158] *Ibid.*, para. 3.1.
[159] The Prosecution adds that the international crimes most frequently committed in wartime situations are "manifestations of collective criminality" and any allegation of "perpetrating" a crime in an indictment can impute liability to an individual for his participation in any of the categories of joint criminal enterprise described in the *Tadić* Appeals Judgement (Prosecution Brief, para. 3.5).

PURL: https://www.legal-tools.org/doc/46d2e5/

from the village of Jaskići, even though neither this form of liability nor any other was pleaded in the indictment. The Prosecution adds that, in this case, it stated in both its Pre-Trial Brief and its opening statement of October 2000 that it intended to rely on the third form of joint criminal enterprise. It further argues that Krnojelac did not claim at trial that the failure of the Indictment to make reference to an extended form of joint criminal enterprise had impaired his defence and that, in its Final Trial Brief, the Defence actually explicitly addressed all the forms of joint criminal enterprise.

127. Krnojelac submits that, on the contrary, the Trial Chamber was right to adopt this approach since the wording of the charges is relevant to the nature of and reasons for the charges against him, of which he must be informed without delay.[160] Krnojelac adds that the indictment was twice returned to the Prosecution for more information[161] and, in response to the Prosecution's argument that he did not object to this form of liability when it was mentioned in the Prosecution's opening statement, he points out that it was not his role to correct his opponent's mistakes.[162] In its reply, the Prosecution points to the principle of waiver and submits that the fact that Krnojelac dealt with the third form in his Final Trial Brief indicates that he considered the charges to be sufficiently precise. This is an important factor which the Trial Chamber should have borne in mind in determining whether it would have been unfair to the Accused to allow the Prosecution to rely on this form of responsibility.[163]

128. The Appeals Chamber holds that, insofar as it affects how precisely the indictment must set out the forms of joint criminal enterprise being pleaded by the Prosecution, the issue raised by the Prosecution is definitely of general importance for the development of the Tribunal's case-law and deserves analysis, even though the Prosecution does not request the Judgment to be reviewed on the point.

129. The Appeals Chamber notes that, pursuant to Article 18(4) of the Statute, the indictment must set out "a concise statement of the facts and the crime or crimes with which the accused is charged". Likewise, Rule 47(C) of the Rules provides that the indictment shall set out not only the name and particulars of the suspect but also "a concise statement of the facts of the case".

130. The Prosecution's obligation to set out a concise statement of the facts of the case in the indictment must be interpreted in the light of the provisions of Articles 21(2), 21(4)(a) and 21(4)(b)

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[160] Defence Response, paras. 57 to 61.
[161] *Ibid.*, para. 62.
[162] *Ibid.*, paras. 64 and 65.
[163] Prosecution Reply, para. 3.6.

PURL: https://www.legal-tools.org/doc/46d2e5/

of the Statute, which provide that, in the determination of charges against him, the accused shall be entitled to a fair hearing and, more specifically, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence.

131. In the case-law of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such facts are to be proven.[164] Hence, the question of whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.

132. In the *Kupreškić* case, the Appeals Chamber stressed that the materiality of a particular fact cannot be determined in the abstract. It depends on the objective of the Prosecution case. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct of the accused. For example, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail. Clearly, there may be instances where the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes:[165]

> 92. It is of course possible that an indictment may not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession. However, in such a situation, doubt must arise as to whether it is fair to the accused for the trial to proceed. In this connection, the Appeals Chamber emphasises that the Prosecution is expected to know its case before it goes to trial. It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds. There are, of course, instances in criminal trials where the evidence turns out differently than expected. Such a situation may require the indictment to be amended, an adjournment to be granted, or certain evidence to be excluded as not being within the scope of the indictment.
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> 114. The Appeals Chamber notes that, generally, an indictment, as the primary accusatory instrument, must plead with sufficient detail the essential aspect of the Prosecution case. If it fails to do so, it suffers from a material defect. A defective indictment, in and of itself, may, in certain circumstances cause the Appeals Chamber to reverse a conviction. The Appeals Chamber, however, does not exclude the possibility that, in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category. For the reasons that follow, the Appeals Chamber finds that this case is not one of them.

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[164] *Kupreškić* Appeals Judgement quoting the *Furundžija* Appeals Judgement, para. 147.
[165] *Kupreškić* Appeals Judgement, paras. 89 to 114.

PURL: https://www.legal-tools.org/doc/46d2e5/

133. Furthermore, in the *Rutaganda* case, the ICTR Appeals Chamber considered that before a Chamber holds that an alleged fact is not material or that differences between the wording of the indictment and the evidence adduced are minor, it should generally ensure that such a finding is not prejudicial to the accused.[166] The ICTR Appeals Chamber stated that an example of such prejudice would be vagueness capable of misleading the accused as to the nature of the criminal conduct with which he is charged. Depending on the particular circumstances of each case, the issue will be to determine whether an accused could reasonably identify the crime and conduct specified in each paragraph of the indictment.[167]

134. The Appeals Chamber further notes the statement in the *Aleksovski* case that "the practice by the Prosecution of merely quoting the provisions of Article 7(1) in the indictment is likely to cause ambiguity, and it is preferable that the Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged."[168]

135. The Appeals Chamber will consider this issue of general importance raised by the Prosecution in the light of the applicable law. The relevant parts of the Judgment, namely paragraphs 84 to 86, show that, while the Prosecution made no express reference to any particular form of joint criminal enterprise in the Third Amended Indictment, the Trial Chamber made a clear distinction between the basic and extended forms of joint criminal enterprise.

136. As regards the basic form of joint criminal enterprise, the Trial Chamber referred to paragraph 84 of the Judgment in its Decision on the Form of the Second Amended Indictment[169] in which it held that the Prosecution's use of the expression "acted pursuant to a joint criminal enterprise with guards and soldiers" in paragraph 5.1 of the indictment (persecution) corresponded to the basic form of joint criminal enterprise. In the same paragraph, the Trial Chamber found this to be true also of the expression "in concert with others" which appears in paragraphs 5.17, 5.21, 5.22, 5.26 and 5.41 of the Indictment (acts of torture, beatings, enslavement). In paragraph 85, the Trial Chamber held that:

> Even where a particular crime charged has not been specifically pleaded in the indictment as part of the basic joint criminal enterprise, a case based upon the Accused's participation in a basic joint criminal enterprise to commit that crime may still be considered by the Trial Chamber if it is one of the crimes charged in the indictment and such a case is included within the Prosecution's Pre-Trial Brief. In the present case, the Prosecution Pre-Trial Brief sufficiently put the Accused on notice that a basic joint criminal enterprise was alleged with respect to all the crimes charged in the Indictment.

[166] *Rutaganda* Appeals Judgement, para. 303.
[167] *Ibid.*, the ICTR Appeals Chamber quoting the *Furundžija* Appeals Judgement, para. 61.
[168] *Aleksovski* Appeals Judgement, footnote 319.
[169] Decision on Form of Second Amended Indictment, 11 May 2000.

PURL: https://www.legal-tools.org/doc/46d2e5/

137. Conversely, when it examined the extended form of joint criminal enterprise, the Trial Chamber took into consideration the fact that the Prosecution sought to rely on this form without having amended the Indictment after the Trial Chamber had expressly interpreted the second amended indictment as alleging a basic form of joint criminal enterprise.[170] Accordingly, the Trial Chamber concluded in paragraph 86 that:

> […] The Trial Chamber in the exercise of its discretion considers that, in the light of its own express interpretation that only a basic joint criminal enterprise had been pleaded, it would not be fair to the Accused to allow the Prosecution to rely upon this extended form of joint criminal enterprise liability with respect to any of the crimes alleged in the Indictment in the absence of such an amendment to the Indictment to plead it expressly.

138. For the applicable law on the form of the indictment, the Appeals Chamber refers to the section of this Judgement on the issues of law raised by the parties.[171] The Appeals Chamber reiterates that Article 18(4) of the Statute requires that the crime or crimes charged in the indictment and the alleged facts be set out concisely in the indictment.[172] With respect to the nature of the liability incurred, the Appeals Chamber holds that it is vital for the indictment to specify at least on what legal basis of the Statute an individual is being charged (Article 7(1) and/or 7(3)). Since Article 7(1) allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity. The Appeals Chamber considers that such ambiguity should be avoided and holds therefore that, where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial. Likewise, when the Prosecution charges the "commission" of one of the crimes under the Statute within the meaning of Article 7(1), it must specify whether the term is to be understood as meaning physical commission by the accused or participation in a joint criminal enterprise, or both. The Appeals Chamber also considers that it is preferable for an indictment alleging the accused's responsibility as a participant in a joint criminal enterprise also to refer to the particular form (basic or extended) of joint criminal enterprise envisaged. However, this does not, in principle, prevent the Prosecution from pleading elsewhere than in the indictment - for instance in a pre-trial brief - the legal theory which it believes best demonstrates that the crime or crimes alleged are imputable to the accused in law in the light of the facts alleged. This option is, however, limited by the need to guarantee the accused a fair trial.

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[170] In its Pre-Trial Brief, the Prosecution refers to the fact that even if it had not been established that the Accused participated in a joint criminal enterprise of persecution, beatings, torture and killings, these crimes were "natural and foreseeable consequences" of his participation in an enterprise consisting of the illegal imprisonment of the non-Serbs and, in particular, of the Accused's actions in permitting outsiders access to the camp. (*Ibid.*, paras. 61 to 62).
[171] See the introduction to this Judgement.
[172] Moreover, Rule 47(C) of the Rules provides that the indictment shall set out not only the name and particulars of the suspect but also "a concise statement of the facts of the case".

PURL: https://www.legal-tools.org/doc/46d2e5/

139. The Appeals Chamber points out that the Prosecution's obligation to draw up a sufficiently precise indictment must be interpreted in the light of the provisions of Articles 21(2), 21(4)(a) and 21(4)(b) of the Statute, which state that, in the determination of charges against him, the accused shall be entitled to a fair hearing and, more specifically, to be informed of the nature and cause of the charge against him and to have adequate time and facilities for the preparation of his defence. The Trial Chamber's approach should be seen from this perspective.

140. The Appeals Chamber notes that, in its Decision on the Form of the Second Amended Indictment, the Trial Chamber, ruling on a complaint regarding the lack of precision of paragraph 5.2 of the indictment,[173] pointed out that the Prosecution was pleading the common purpose theory in the indictment for the first time. It also responded to the issue of what the theory included[174] and, in so doing, referred to the three categories of case specified in the *Tadić* Appeals Judgement. It found in paragraph 11 of the decision that:

> As the indictment is silent on the subject, it is unnecessary for present purposes to consider the last of those categories, where the offence charged falls outside the scope of the common purpose of those engaged in the joint criminal enterprise but which is nevertheless within the contemplation of the accused as a possible incident of that enterprise.

141. Given this decision, had the Prosecution considered that the Trial Chamber had misconstrued its intentions on the matter, it should have dispelled any ambiguity either by requesting the Trial Chamber to revisit its decision or by seeking leave to amend the Indictment. If the Prosecution had not considered pleading an extended form of joint criminal enterprise until after the decision in question, it would be for the Prosecution to seek leave to amend the Indictment after that decision.

142. The Appeals Chamber observes that paragraph 86 of the Judgment, cited in paragraph 137 above, shows that the Trial Chamber reached the conclusion it did precisely because the Prosecution failed to amend the Indictment after the Chamber had unambiguously interpreted the second amended indictment as not pleading an extended form of joint criminal enterprise. Given these circumstances, the Trial Chamber decided "in the exercise of its discretion" that it would not be fair to the Accused to allow the Prosecution to rely upon this extended form of joint criminal enterprise to establish his liability.

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[173] Regarding more specifically the alleged common plan.
[174] Decision on Form of Second Amended Indictment, para. 9.

PURL: https://www.legal-tools.org/doc/46d2e5/

143. The Appeals Chamber further notes that, while the Prosecution's Pre-Trial Brief of 16 October 2000, that is subsequent to the decision of 11 May 2000, pleads an extended form of joint criminal enterprise for the first time, the Indictment is silent on the matter.

144. It must be noted that these circumstances left the Defence in some uncertainty as to the Prosecution's argument. Therefore, even though it is apparent from Krnojelac's Final Trial Brief that he did take the three forms of joint criminal enterprise described in the *Tadić* Appeals Judgement into consideration before concluding that he had not taken part in a joint criminal enterprise,[175] the Appeals Chamber holds that, in view of the persistent ambiguity surrounding the issue of what exactly the Prosecution argument was, the Trial Chamber had good grounds for refusing, in all fairness, to consider an extended form of liability with respect to Krnojelac.

145. For the above reasons, the Prosecution second ground of appeal on the form of the Indictment is dismissed.

C. The Prosecution's third and fourth grounds of appeal: errors relating to the *mens rea* of superior responsibility under Article 7(3) of the Statute

146. The third and fourth grounds of appeal both invoke errors relating to the *mens rea* of superior responsibility under Article 7(3) of the Statute. The Prosecution submits that the Trial Chamber erred in fact by not concluding that, for the purposes of Article 7(3) of the Statute, Krnojelac "knew or had reason to know" that detainees were being tortured by his subordinates as opposed to being beaten arbitrarily (third ground of appeal) and that his subordinates were involved in the murder of the detainees listed in Schedule C of the Indictment (fourth ground of appeal). Given the similarity of the issues raised, the Appeals Chamber will address both grounds of appeal in the same section.

147. In the form of relief, the Prosecution requests that the Appeals Chamber reverse the Trial Chamber's findings under counts 5 (inhumane acts as a crime against humanity) and 7 (cruel treatment as a violation of the laws or customs of war) and find Krnojelac guilty under counts 2 (torture as a crime against humanity) and 4 (torture as a violation of the laws or customs of war) pursuant to Article 7(3) of the Statute. It also requests that the Appeals Chamber reverse the acquittals under count 8 of the Indictment (murder as a crime against humanity) and count 10 (murder as a violation of the laws or customs of war) and find Krnojelac guilty under these counts

[175] Krnojelac's Final Trial Brief, paras. 103 to 109.

PURL: https://www.legal-tools.org/doc/46d2e5/

pursuant to Article 7(3) of the Statute. The Prosecution requests that the Trial Chamber's sentence be increased commensurately to reflect Krnojelac's liability for the above two crimes.[176]

148. In support of both grounds of appeal,[177] the Prosecution recalls the legal test set out by the Trial Chamber in paragraph 94 of the Judgment for determining a superior's *mens rea*. The Trial Chamber stated that:

> It must be demonstrated that the superior knew or had reason to know that his subordinate was about to commit or had committed a crime. It must be proved that (i) the superior had actual knowledge, established through either direct or circumstantial evidence, that his subordinates were committing or about to commit crimes within the jurisdiction of the Tribunal, or (ii) he had in his possession information which would at least put him on notice of the risk of such offences, such information alerting him to the need for additional investigation to determine whether such crimes were or were about to be committed by his subordinates. This knowledge requirement has been applied uniformly in cases before this Tribunal to both civilian and military commanders. The Trial Chamber is accordingly of the view that the same state of knowledge is required for both civilian and military commanders.[178]

149. The Appeals Chamber notes that the Prosecution's submissions do not challenge the legal definition of the "had reason to know" standard provided by the Trial Chamber but instead argue that the Trial Chamber erred in applying the test to the facts of the case.

150. In general terms (the submissions specific to each ground of appeal are analysed below), the Prosecution states that the only finding a reasonable trier of fact could have reached was that alarming information was available to Krnojelac which put him on notice of possible unlawful acts by his subordinates at the KP Dom and required him to carry out an additional investigation. The Prosecution maintains that, in spite of this information, Krnojelac failed in his duty to prevent the acts of torture and murders and punish their perpetrators. In support of both grounds of appeal, the Prosecution reiterates the Trial Chamber's findings that Krnojelac held the position of warden in the KP Dom and exercised supervisory responsibility over all subordinate personnel and detainees at the KP Dom. As for the actions of the KP Dom guards, the Prosecution points out that the Trial Chamber held Krnojelac responsible as their superior under Article 7(3) of the Statute and that, as warden of the KP Dom, Krnojelac was the *de jure* superior of the guards and knew that they were involved in the beating of the non-Serb detainees.[179]

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[176] Prosecution Brief, paras. 4.41 and 5.21; T(A), 14 May 2003, p. 74.

[177] Prosecution Brief, para. 4.11.

[178] Judgment, para. 94 (footnotes omitted).

[179] The Prosecution refers to paragraphs 107 and 318 of the Judgment (See Prosecution Brief, for the third ground of appeal, paras. 4.8 and 4.9 and, for the fourth ground of appeal, paras. 5.5 and 5.6). As regards Krnojelac's superior responsibility, the Trial Chamber reached the following conclusions in the aforementioned paragraphs of the Judgment: regarding Krnojelac's position as warden, "[T]he Prosecution has established that the Accused held the position of warden, as that term is generally understood, at the KP Dom, that the lease agreement by which the Accused leased part of the KP Dom to the military had little impact upon the single hierarchy within the KP Dom or the Accused's position

PURL: https://www.legal-tools.org/doc/46d2e5/

151. According to the Prosecution, the Trial Chamber's approach to torture and murders runs counter to the Tribunal’s case-law, in particular, to the *Čelebići* Appeals Judgement. The Prosecution asserts that it is clear from the case-law that the information received by the superior need not point to any *specific* crime;[180] the superior need only receive information *of a general nature*, putting him on notice of the *risk* of crimes being committed.

152. Aside from routinely putting forward the argument that Krnojelac had no jurisdiction, the Defence maintains that: “the Prosecution refers to allegations and indicia endeavouring to use some facts, some information that the Accused might possibly have raised to the level of alarming information and which would then lay down the standard for *mens rea*, that is are allowed to bring charges against the Accused under 7(3) of the Statute.”[181] The Defence submits that if the Prosecution's interpretation were to be accepted by the Appeals Chamber:

> […] for a person to be held responsible as a superior it is enough that he has information that there is an armed conflict between the Serbs and the Muslims in progress at a relevant sector, that some Muslims are being held imprisoned and that they are guarded by the Serb prison guards. Such a general piece of information would then be sufficient to alert superiors in charge that there is a risk of possible crimes involved. This would possibly reduce the role of superiors to investigations as to whether there are any crimes taking place or not, on daily basis. So, the information on an armed conflict between two ethnic groups, of which one holds the members of the other group in prison and organises guards to keep them imprisoned is the kind of general information which may notify superiors that there is a risk of crime involved. Such a claim is, of course, unacceptable from the point of view of international criminal law and it most certainly is not in accord with adopted standards and principles.[182]

153. Here, the Prosecution's argument seems to come down to accepting that, simply because of the beatings, of which Krnojelac was found to *have been aware* and which constituted cruel treatment and inhumane acts, it must be concluded that Krnojelac *had reason to know* that acts of

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as warden within that hierarchy, and that the Accused exercised supervisory responsibility over all subordinate personnel and detainees at the KP Dom” (para. 107). In respect of the actions of the KP Dom guards, “the Accused is responsible as their superior under Article 7(3) of the Statute. As warden of the KP Dom, the Accused was the *de jure* superior of the guards, and he knew […] that they were involved in the beating of non-Serb detainees. Not only did the Accused personally see one of his subordinates beat a detainee, he also heard about such incidents, and it must have been clear that, considering that the guards were in direct contact with and controlled the detainees, some of them were involved. The Trial Chamber considers that the Accused failed in his duty as warden to take the necessary and reasonable measures to prevent such acts or to punish the principle offenders […]” (para. 318, footnotes omitted).

[180] Prosecution Brief, para. 4.12. According to the Prosecution: “[…] he can be said to have reason to know that his subordinates may commit crimes and will be responsible for those crimes on that basis. Nor does the superior need to be in actual possession of the information about the crimes committed by the subordinates. It's sufficient if he was provided with the relevant information. Even if the information was made available to him. If the information is objectively alarming, his duty to inquire or to investigate, thereby, is triggered” (T(A), 14 May 2003, p. 73). Thus “in the *Čelebići* case, it was held that the information available to the superior does not have to be information as to the exact nature of a crime. It's enough -- it has to be enough to put the superior on notice. It doesn't actually have to say, ‘There's torture going on out there, and it's on this prohibited purpose.’ It has to be enough to place him on notice that he's got to do something further” (T(A), 14 May 2003, p. 192).

[181] T(A), 14 May 2003, pp. 164 and 165. See also Defence Response, para. 101.

[182] Defence Response, para. 112.

PURL: https://www.legal-tools.org/doc/46d2e5/

torture and murders might be committed (as knowledge of the beatings constitutes sufficient information to alert him to the risk of acts of torture and murders being committed) and that, since he did not open any investigation in order to ascertain whether such crimes had been or were about to be committed, Krnojelac had the requisite *mens rea* to incur liability pursuant to Article 7(3) of the Statute for torture and murders.[183] On this point, the Appeals Chamber considers it appropriate to provide the following clarification.

154. The *Čelebići* Appeals Judgement defines the "had reason to know" standard by setting out that "[a] showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he 'had reason to know' […] This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge."[184]

155. The Appeals Chamber finds that this case-law shows only that, with regard to a specific offence (torture for example), the information available to the superior need not contain specific details on the unlawful acts which have been or are about to be committed. It may not be inferred from this case-law that, where one offence (the "first offence") has a material element in common with another (the "second offence") but the second offence contains an additional element not present in the first, it suffices that the superior has alarming information regarding the first offence in order to be held responsible for the second on the basis of Article 7(3) of the Statute (such as for example, in the case of offences of cruel treatment and torture where torture subsumes the lesser offence of cruel treatment).[185] Such an inference is not admissible with regard to the principles

[183] Without it being very explicit, the Prosecution sometimes seems to support this argument. As for the alleged error regarding torture, the Prosecution made the following submissions at the appeal hearing: "Our proposition is a very simple one. Applying *Čelebići* to the facts of this case can lead to only one reasonable conclusion, and that is that by actually knowing of the beatings going on within KP Dom, he was on notice of the risk that at least some of them may have resulted in torture. His knowledge of the beatings in this KP Dom environment was enough to alert him to the need for additional information or to conduct an investigation *to ascertain whether torture by beatings was being committed by his subordinates*." (T(A), 14 May 2003, p. 72). Regarding the murders, the Prosecution stated at the appeal hearing: "when one looks at the peculiarities of these beatings, the peculiarities of the harsh treatment meted out against these individuals, the only difference between the beatings as found and the murders has to do in terms of what was the inevitable effect. In one case it was a case of beatings that resulted in incapacitation. In another, it was a case of certain beatings that resulted in death. In other words, a level of behaviour, a level of deportment, if I may so describe it, that is of the same genus and of the same type. And significantly, one would consider that when one looks at what in fact is the definition of murder, isn't murder dealing with in fact acts with intent to cause grievous bodily harm? Isn't that what murder is? So does it mean that because, for example, that final step is not reached, that you are not put on inquiry […]" (T(A), 14 May 2003, pp. 116 and 117).

[184] *Čelebići* Appeals Judgement, para. 238.

[185] Judgment, para. 314.

PURL: https://www.legal-tools.org/doc/46d2e5/

governing individual criminal responsibility. In other words, and again using the above example of the crime of torture, in order to determine whether an accused "had reason to know" that his subordinates had committed or were about to commit acts of torture, the court must ascertain whether he had sufficiently alarming information (bearing in mind that, as set out above, such information need not be specific) to alert him to the risk of acts of torture being committed, that is of beatings being inflicted not arbitrarily but for one of the prohibited purposes of torture. Thus, it is not enough that an accused has sufficient information about beatings inflicted by his subordinates; he must also have information – albeit general – which alerts him to the risk of beatings being inflicted for one of the purposes provided for in the prohibition against torture.

156. The Appeals Chamber reiterates that an assessment of the mental element required by Article 7(3) of the Statute should, in any event, be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question.[186]

157. Having provided this clarification, the Appeals Chamber will now analyse the Prosecution's submissions in support of each ground of appeal.

1. Third ground of appeal: error in the Trial Chamber's findings of fact regarding the acts of torture committed at the KP Dom

158. Apart from the finding that Krnojelac held a position of superior authority in the KP Dom,[187] the Prosecution restates some of the Trial Chamber's other findings of fact in support of this ground of appeal,[188] in particular:

- that Krnojelac's subordinates tortured some of the detainees;[189]

- that Krnojelac knew or had reason to know that Muslim detainees were being beaten or otherwise generally mistreated;[190]

- that Krnojelac knew that a detainee by the name of Ekrem Zeković had been tortured.[191]

159. In essence, the Prosecution challenges the Trial Chamber's findings in paragraph 313 of the Judgment which reads as follows:

[186] *Čelebići* Appeals Judgement, para. 239.
[187] As stated previously, the Prosecution refers to paragraphs 107 and 318 of the Judgment.
[188] Prosecution's Notice of Appeal, p. 3.
[189] The Prosecution refers to paragraphs 226 to 236, 239 to 242, 249 to 253, 254 to 255, 256 to 258, 262, 268, 277, 282, 300 and 305 of the Judgment. See Prosecution Brief, para. 4.2.
[190] The Prosecution refers to paragraphs 308 to 312 of the Judgment. See Prosecution Brief, para. 4.3.
[191] The Prosecution refers to paragraph 312 of the Judgment. See Prosecution Brief, para. 4.7.

PURL: https://www.legal-tools.org/doc/46d2e5/

> The Trial Chamber is not satisfied, however, that the Accused knew that the other beatings were inflicted for one of the purposes provided for in the prohibition against torture, rather than being meted out purely arbitrarily. The fact that the Accused witnessed the beating of Zeković, ostensibly for the prohibited purpose of punishing him for his failed escape is not sufficient, in itself, to conclude that the Accused knew or that he had reason to know that, other than in that particular instance, beatings were inflicted for any of the prohibited purposes. Having personally observed Burilo torturing Zeković, the Accused was obliged to punish Burilo, but that isolated fact did not oblige him to investigate the incident in such a way as would have put him on notice that others were being tortured in the KP Dom. The Accused is therefore not responsible as a superior for the torture charged in the Indictment.

160. The Prosecution submits that, when the Trial Chamber examined whether Krnojelac could be held responsible as a superior for the acts of torture on the basis of the beatings inflicted, it appeared to have erroneously required proof - contrary to the Tribunal's case-law cited above[192] - that Krnojelac possessed "*specific* information" which would have led him to conclude that a "*specific* detainee" was being, or had been, tortured. The Prosecution maintains that, given the facts accepted by the Trial Chamber, the only reasonable conclusion which a trier of fact should have reached was the following: the information available to Krnojelac was sufficient to put him on notice that his subordinates were involved in the beatings of detainees and, had he acted upon this information, any investigation would have made it clear to him that the purpose of all of these beatings was one or more of the prohibited purposes of torture, namely punishment, interrogation or intimidation.[193] At the appeal hearing, the Prosecution made the following submissions:

> [W]hen a person is the warden of such a prison as this for 15 months, who has an office right in the centre of the complex, who is told by at least one detainee, the witness RJ, that the detainees could hear the sounds of beatings, who personally saw one detainee, the detainee Ekrem Zeković, being beaten as punishment for an attempted escape, and who had every opportunity to observe the physical manifestations of the widespread and brutal beatings which the Trial Chamber itself said must have been obvious to everyone, and when all of this -- when all of this is considered against the fact that he knew the discriminatory nature of the imprisonment and of the discriminatory nature of the inhumane living conditions for the detainees, and indeed he knew that the interrogations in the camp were pervasive, that interrogators were coming in and out, interrogations could be said to have been a daily feature or at least a very frequent feature of life in the KP Dom, with all these facts, the only reasonable conclusion must be that he was placed on notice of the risk of torture.[194]

161. The Appeals Chamber holds that the question which then arises is as follows: is the Trial Chamber's finding that Krnojelac neither knew nor had reason to know that his subordinates had inflicted or were about to inflict beatings for one of the purposes mentioned in the prohibition against torture unreasonable? If so, did this error occasion a miscarriage of justice?

162. The relevant facts accepted by the Trial Chamber first need to be restated. The Appeals Chamber notes that these facts relate to: (1) the context in which the beatings were committed and

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[192] Prosecution Brief, para. 4.11; Prosecution Reply, para. 4.4; T(A), 14 May 2003, pp. 191 and 192.
[193] Prosecution Brief, paras. 4.25 and 4.39.
[194] T(A), 14 May 2003, pp. 73 and 74.

PURL: https://www.legal-tools.org/doc/46d2e5/

the widespread nature of these beatings; (2) Krnojelac's jurisdiction over his subordinates as prison warden; and (3) the frequency of the interrogations and the punishment inflicted upon the detainees.

(a) Findings related to the context in which the beatings were committed and the widespread nature of these beatings

163. The Trial Chamber accepted, amongst others, the following facts: the detention of non-Serbs in the KP Dom, and the acts or omissions which took place therein, were clearly related to the widespread and systematic attack against the civilian population.[195] The brutal and deplorable living conditions imposed upon the non-Serb detainees at the KP Dom in the period from April 1992 to July 1993 constituted acts and omissions of a seriousness comparable to the other crimes enumerated under Article 5 and Article 3 of the Tribunal's Statute and constituted inhumane acts and cruel treatment under those Articles.[196] There was a deliberate policy of isolating detainees within the KP Dom. The detainees who were taken to work assignments outside of the KP Dom were kept isolated in a separate room to prevent them from spreading "news" to the outside world. To ensure compliance with these unwritten "rules" on communication, violations were punished with solitary confinement and/or mistreatment, such as beatings.[197] The non-Serb detainees were deliberately housed in cramped conditions.[198] There is no evidence that Krnojelac personally initiated the living conditions imposed upon the non-Serb detainees, and no evidence that he issued any orders to the guards of the KP Dom with respect to the imposition of these living conditions. The Trial Chamber was nevertheless satisfied that Krnojelac had knowledge of the conditions under which the non-Serb detainees were being held and of the effects these conditions were having on their physical and psychological health. A number of detainees gave evidence that they met with Krnojelac and told him about their suffering (witnesses Safet Avdić, FWS-182, RJ and Muhamed Lisica). Krnojelac admitted that he habitually met with detainees and he confirmed that, during these conversations, the detainees discussed the living conditions at the KP Dom.[199] He was aware of the intent of the principal offenders and was aware that his failure to take any action as warden in relation to this knowledge was contributing in a substantial way to the continued maintenance of these conditions constituting inhumane acts and cruel treatment by the principal offenders by giving encouragement to the principal offenders to maintain these living conditions.[200] Krnojelac was aware that his subordinates were creating living conditions at the KP Dom which constituted

[195] Judgment, para. 50.
[196] *Ibid.*, para. 133.
[197] *Ibid.*, para. 134.
[198] *Ibid.*, para. 135.
[199] *Ibid.*, para. 169.
[200] *Ibid.*, para. 171.

PURL: https://www.legal-tools.org/doc/46d2e5/

inhumane acts and cruel treatment, and he omitted to take any action to prevent his subordinates from maintaining these living conditions and failed to punish his subordinates for the implementation of these living conditions.[201] There is a great deal of evidence that detainees were in fact systematically beaten and mistreated while detained at the KP Dom.[202] From April 1992 until July 1992 beatings took place on a frequent and systematic basis. KP Dom guards used lists in order to select those detainees to be taken out to the administrative building and beaten there. Some of the detainees were taken out and beaten on several occasions. There is no evidence however that, as alleged, Krnojelac drafted the lists according to which detainees were selected and called out.[203] At different times in June and July 1992, generally in the evening, small groups of detainees were called out by a guard of the KP Dom and taken away to the administration building. Soon thereafter, sounds of beating, cries and moans were frequently heard by other detainees. KP Dom guards sometimes took part in the beatings and they could be overheard, insulting or provoking the victims; at least five guards took part in one or several of those incidents. KP Dom guards and individuals coming from outside beat the inmates with their fists and feet or with batons. Shots were sometimes heard and the detainees never returned to their rooms. Other detainees who entered some of the rooms where those beatings had taken place saw traces of blood on the walls and on the floor of the room as well as on a baton.[204] Krnojelac knew that Muslim detainees were being beaten and that they were otherwise being generally mistreated.[205] He was personally told about non-Serb detainees being beaten and mistreated. Witness RJ told Krnojelac that detainees could hear the sounds of beatings coming from the administrative building. He also told Krnojelac about the beating of a retarded detainee.[206] In view of the widespread nature of the beatings at the KP Dom and the obvious resulting physical marks on the detainees, Krnojelac could not have failed to learn of them, although he denies it. The consequences of the mistreatment upon the detainees, the resulting difficulties that some of them had in walking, and the pain which they were in must have been obvious to everyone.[207] Krnojelac must have been aware that the detainees, for whose care he was responsible, and some of whom he knew personally, were being mistreated.[208] Not only did he personally see one of his subordinates beat a detainee, but he also heard about such incidents, and it

[201] *Ibid.*, para. 172.
[202] *Ibid.*, para. 217.
[203] *Ibid.*, para. 248.
[204] *Ibid.*, para. 273.
[205] *Ibid.*, para. 308.
[206] *Ibid.*, para. 310.
[207] *Ibid.*, para. 311.
[208] *Ibid.*, para. 312.

PURL: https://www.legal-tools.org/doc/46d2e5/

must have been clear that some of them were involved, considering that the guards were in direct contact with and controlled the detainees.[209]

(b) Findings related to Krnojelac's jurisdiction over his subordinates as prison warden

164. The Trial Chamber accepted, amongst others, the following facts: the position of prison warden, in the ordinary usage of the word, necessarily connotes a supervisory role over all prison affairs. The warden held the highest position of authority in the KP Dom and it was his responsibility to manage the entire prison.[210] Krnojelac voluntarily undertook the position of acting warden and then warden until his departure from the KP Dom in July 1993. He held the position of warden for fifteen months (from 18 April 1992 until the end of July 1993).[211] He voluntarily accepted the positions in full awareness that non-Serb civilians were being illegally detained at the KP Dom because of their ethnicity.[212] By virtue of his position as warden of the KP Dom, Krnojelac knew that the non-Serb detainees were being unlawfully detained. Krnojelac admitted that he knew that the non-Serb detainees were detained because they were non-Serbs and that he knew that none of the procedures in place for legally detained persons was ever followed at the KP Dom.[213] The warden retained jurisdiction over all detainees in the KP Dom.[214] Krnojelac went to the KP Dom almost every day of the working week. While there he would go to the canteen, the prison yard or elsewhere inside the compound, all places where he had ample opportunity to notice the physical condition of the non-Serb detainees.[215]

(c) Findings related to the interrogations, their frequency and the punishment inflicted upon the detainees

165. The Trial Chamber accepted the following facts: upon entry into the KP Dom, some of the detainees were searched and registered, while others were not. Similarly, interrogations of those detained were conducted sometimes within a few days or weeks of their arrival, sometimes only after months and, in some cases, never. In the course of these interrogations, some of the detainees were asked about weapons, about their membership in the SDA and about their whereabouts before and during the outbreak of the conflict in the area. A number of detainees were threatened in the course of the interrogations, and others heard fellow detainees being mistreated in neighbouring

[209] *Ibid.*, para. 318.
[210] *Ibid.*, para. 97.
[211] *Ibid.*, paras. 96, 99 and 311.
[212] *Ibid.*, para. 100.
[213] *Ibid.*, para. 124.
[214] *Ibid.*, para. 102.
[215] *Ibid.*, para. 311.

PURL: https://www.legal-tools.org/doc/46d2e5/

rooms. Many of the detainees were forced to sign written statements. None of the detainees was released from the KP Dom following interrogation, notwithstanding the individual outcome of the interview.[216] The suffering of the non-Serb detainees during the winter of 1992 was the result of a deliberate policy on the part of those in charge of the KP Dom. Attempts made by some of the non-Serb detainees to make winter clothes out of blankets were punished. The blankets were removed and those involved were sent to solitary confinement, where temperatures were even lower.[217] Non-Serb detainees who arrived at the KP Dom with injuries sustained prior to or in the course of their arrest were not given access to medical treatment, nor were non-Serb detainees who were severely beaten during interrogations at the KP Dom.[218] In addition to the physically taxing conditions of detention, the non-Serb detainees were also subject to a psychologically exhausting regime while detained at the KP Dom. Any attempts made by non-Serb detainees to improve their living conditions in the camp were punished with solitary confinement. Acts which resulted in beatings or periods in the isolation cells included efforts to get additional food, or access to warm water, and attempts to communicate with each other, the guards, or the outside world.[219] The non-Serb detainees were subjected to harrowing psychological abuse during their period of detention at the KP Dom. The detainees were exposed to the sounds of torture and beatings over a period of months, in particular in June and July 1992.[220] On 8 July 1993, Ekrem Zeković, a Muslim detainee, tried to escape from the KP Dom, but was re-captured the same day. As soon as he was brought back to the KP Dom, Zeković was severely beaten by Milenko Burilo, a guard of the KP Dom. While he was being beaten, Krnojelac intervened to stop it. As he was walking away from the scene, Burilo continued to assault Zeković in Krnojelac's presence. Krnojelac saw the detainee Ekrem Zeković being beaten. Moreover he met with him and they had a conversation about his attempted escape. The treatment meted out to Zeković amounted to torture pursuant to Article 5(f) and Article 3 of the Statute and the Accused was aware that Zeković was being tortured.[221] Several detainees, all work companions of Zeković, were severely beaten by the KP Dom guards as punishment for Zeković's escape or in order to obtain information about his whereabouts. The Trial Chamber did not accept Krnojelac's denial on this point.[222] The various instances of mistreatment were aimed at either obtaining information from those detainees who might know something about Zeković's escape plan or whereabouts following his escape, or punishing them for his failed attempt, or because they

[216] *Ibid.*, para. 120.
[217] *Ibid.*, para. 138.
[218] *Ibid.*, para. 141.
[219] *Ibid.*, para. 142.
[220] *Ibid.*, para. 143.
[221] *Ibid.*, paras. 231, 309 and 312.
[222] *Ibid.*, para. 233.

PURL: https://www.legal-tools.org/doc/46d2e5/

were suspected of having played a part in his escape.[223] Detainees were regularly taken out of their rooms or from the isolation cells by the guards of the KP Dom, soldiers or policemen for the purpose of interrogations. On several occasions, many detainees who had been taken out in that manner were in fact beaten or otherwise mistreated during the interviews for the purpose of obtaining information or a confession or in order to punish them for some minor violation of prison regulations.[224]

166. In view of the facts accepted by the Trial Chamber, the Appeals Chamber holds that sufficiently alarming information was available to Krnojelac to put him on notice of the risk that torture was being or might be being carried out. The Appeals Chamber considers that, of all the facts accepted by the Trial Chamber, some are of particular significance. Taken as a whole, these facts constitute a sufficiently alarming body of information to put him on notice of the risk of torture. First, it is an established fact that Krnojelac admitted that he *knew* that non-Serbs were being detained because they were non-Serbs and that none of the procedures in place for legally detained persons was ever followed at the KP Dom. It is also a certain fact that Krnojelac had knowledge of the detention conditions under which the non-Serb prisoners were being held, that he often met with detainees who discussed with him the living conditions at the KP Dom and that he knew that Muslim detainees were being beaten and generally mistreated. Moreover, from April until July 1992, beatings took place on a frequent and systematic basis and the consequences of the mistreatment upon the detainees, the difficulties that some of them had in walking, and the pain which they were in must have been obvious to everyone. Krnojelac must *have been aware* that the detainees, for whose care he was responsible, and some of whom he knew personally, were being mistreated.

167. Moreover, the Trial Chamber recognised that the position of prison warden, in the ordinary usage of the word, necessarily connotes a supervisory role over all prison affairs and that Krnojelac voluntarily undertook the position of warden for fifteen months, from 18 April 1992 until the end of July 1993. He retained jurisdiction over all detainees in the KP Dom. Moreover, Krnojelac voluntarily accepted the position in full awareness that Muslim civilians were being illegally detained at the KP Dom because of their ethnicity and he admitted that he knew that the non-Serbs were detained because they were Muslim. In addition, Krnojelac went to the KP Dom almost every day of the working week. While there, he would go to the canteen, the prison yard or elsewhere

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[223] *Ibid.*, para. 234.
[224] *Ibid.*, para. 238.

PURL: https://www.legal-tools.org/doc/46d2e5/

inside the compound, all places where he had ample opportunity to notice the physical condition of the non-Serb detainees.

168. Furthermore, although the interrogations were not systematic, there can be no doubt that they were frequent. The Trial Chamber accepted that the guards at the KP Dom, over whom Krnojelac was acknowledged to have had jurisdiction, regularly went to take detainees out of their rooms or the isolation cells for the purpose of interrogations. It recognised that, on several occasions, many detainees who had been taken out in that manner were in fact beaten or otherwise mistreated during the interviews for the purpose of obtaining information or a confession or in order to punish them for some minor violation of prison regulations. Moreover, the detainees were seemingly aware of the risk of punishment, which was common practice. The Trial Chamber accepted that to ensure compliance with the unwritten rules on communication (that is, that the detainees taken outside the KP Dom were not to spread news from the "outside world"[225]), "violations were punished with solitary confinement and/or mistreatment, such as beatings."[226] Similarly, "any attempts made by non-Serb detainees to improve their living conditions in the camp were punished with solitary confinement. Acts which resulted in beatings or periods in the isolation cells included efforts to get additional food, or access to warm water, and attempts to communicate with each other, the guards, or the outside world."[227] Accordingly, the Trial Chamber stated that "[m]any of the detainees were subjected to beatings and other forms of mistreatment, sometimes randomly, sometimes as a punishment for minor breaches of the prison regulations or in order to obtain information or a confession from them."[228]

169. The Trial Chamber also found that Krnojelac had witnessed the beating of Zeković on 8 July 1993, ostensibly inflicted for the prohibited purpose of punishing him for his failed escape. This beating was considered an act of torture by the Trial Chamber. Admittedly, Krnojelac was not charged with criminal responsibility for the torture of Zeković. However, the Trial Chamber indicated that, had he been so charged, he would have been responsible as a superior pursuant to Article 7(3) of the Statute because he failed to punish KP Dom guard Burilo for torturing Zeković.[229] It further stated: "notwithstanding that there was no objection to the evidence of the beating of Ekrem Zeković, the Trial Chamber does not take that incident into account in relation to Counts 2, 4, 5 and 7 of the Indictment, although the evidence remains in the case as material from which inferences may legitimately be drawn by the Trial Chamber in relation to issues arising out

[225] *Ibid.*, para. 134.
[226] *Ibid*.
[227] *Ibid.*, para. 142.
[228] *Ibid.*, para. 46.

PURL: https://www.legal-tools.org/doc/46d2e5/

of other incidents which *are* the subject of charges in the Indictment."[230] Nonetheless, the Appeals Chamber takes the view that, by refraining from using this fact in relation to counts 2, 4, 5 and 7 of the Indictment, the Trial Chamber committed a factual error occasioning a miscarriage of justice. There was no legal impediment to using Zeković's evidence to establish that Krnojelac had reason to know that his subordinates had committed or might commit crimes of torture other than those relating to Zeković. The Appeals Chamber does not share the Trial Chamber's opinion that "the fact that the Accused witnessed the beating of Zeković, ostensibly for the prohibited purpose of punishing him for his failed escape, is not sufficient, in itself, to conclude that the Accused knew or that he had reason to know that, other than in that particular instance, beatings were inflicted for any of the prohibited purposes."[231] The Appeals Chamber holds that, while this fact is indeed insufficient, in itself, to conclude that Krnojelac *knew* that acts of torture were being inflicted on the detainees, as indicated by the Trial Chamber, it may nevertheless constitute sufficiently alarming information such as to alert him to the risk of other acts of torture being committed, meaning that Krnojelac *had reason to know* that his subordinates were committing or were about to commit acts of torture.

170. Thus, at least from July 1993, Krnojelac had alarming information that was such as to alert him to the risk that acts of torture might subsequently be committed by his subordinates. This information must be taken together with another fact, subsequent to the acts of torture inflicted on Zeković, that was accepted by the Trial Chamber in the following terms:

> [I]n the presence of the Accused, detainees were told by Todović that, because of Zeković's escape, all food rations would be halved, and that work and medical treatment would be forbidden. This punishment actually lasted for at least ten days. All rooms were searched and medicines were seized. In addition, following the escape, several detainees, all work companions of Zeković, were severely beaten by KP Dom guards as punishment for Zeković's escape or in order to obtain information about his whereabouts. The Accused denied having been aware of any punishment inflicted as a result of Zeković's escape. The Trial Chamber does not accept his evidence; nor did his evidence cause the Trial Chamber to have any reasonable doubt as to the truth of the Prosecution witnesses on this issue. FWS-73 was beaten and kicked with boots on the head and on his lower back so brutally that he continues to the present day to suffer from the consequences of his mistreatment. Furthermore, a group of detainees, including some of those who had been beaten, were locked in solitary confinement for varying periods of time. FWS-73 stayed in an isolation cell for 12 days.[232]

The Trial Chamber was satisfied that the various instances of mistreatment were aimed at either obtaining information from those detainees who might know something about Zeković's escape or whereabouts following his escape, or punishing them for his failed attempt, or because they were

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[229] *Ibid.*, para. 312.
[230] *Ibid.*, para. 230.
[231] *Ibid.*, para. 313.

PURL: https://www.legal-tools.org/doc/46d2e5/

suspected of having played a part in his escape. It stated that, in view of the seriousness of the treatment inflicted upon FWS-73, the treatment amounted to torture.[233]

171. The Appeals Chamber holds that the external context (i.e. the circumstances in which the detention centre was set up) and the internal context (i.e. the operation of the centre, in particular, the widespread nature of the beatings and the frequency of the interrogations), taken together with the facts that Krnojelac witnessed the beating inflicted on Zeković ostensibly for the prohibited purpose of punishing him for his failed escape, that after this event at least one other detainee, witness FWS-73, was the victim of acts of torture and that the Trial Chamber dismissed Krnojelac's claim that he was unaware of any punishment inflicted as a result of Zeković's escape, mean that no reasonable trier of fact could fail to conclude that Krnojelac had reason to know that some of the acts had been or could have been committed for one of the purposes prohibited by the law on torture. Krnojelac had a certain amount of general information putting him on notice that his subordinates might be committing abuses constituting acts of torture. Accordingly, he must incur responsibility pursuant to Article 7(3) of the Statute. It cannot be overemphasised that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control. There is no doubt that, given the information available to him, Krnojelac was in a position to exercise such control, that is, to investigate whether acts of torture were being committed, especially since the Trial Chamber considered he had the power to prevent the beatings and punish the perpetrators.[234] In holding that no reasonable trier of fact could have made the same findings of fact as the Trial Chamber, the Appeals Chamber takes the view that the Trial Chamber committed an error of fact.

172. As regards whether this error occasioned a miscarriage of justice, the Appeals Chamber adopts the findings of the ICTR Appeals Chamber in the *Rutaganda* Appeals Judgement and considers that when an accused has been erroneously acquitted by the Trial Chamber, that Chamber failed in its duty by not identifying all of the requisite legal implications of the evidence

[232] *Ibid*., para. 233.
[233] *Ibid.*, para. 235.
[234] As regards beatings, the Trial Chamber held that: "the Accused failed in his duty as warden to take the necessary and reasonable measures to prevent such acts or to punish the principal offenders for the following reasons: (i) He failed to investigate the allegations of beatings, when he would inevitably have ascertained the identity of those responsible for many of those beatings (including those individuals from outside the KP Dom). (ii) He failed to take any appropriate measures to stop the guards from beating and mistreating detainees when, as the warden and their superior, he was obliged to do so. In particular, the Accused failed to order the guards to stop beating detainees and to take appropriate measures so that other individuals from outside the KP Dom would not be in a position to mistreat detainees. (iii) He failed to speak to his subordinates about the mistreatment of detainees. (iv) He failed to punish those guards who would have been identified, had he carried out an investigation, as being responsible for the beatings or to take steps to have them punished. (v) He failed to report their abuses to a higher authority." (See the Judgment, para. 318).

PURL: https://www.legal-tools.org/doc/46d2e5/

presented.[235] The Appeals Chamber considers that, in order to correct the Trial Chamber's error, the acquittals under counts 2 and 4 of the Indictment must be reversed and Krnojelac found guilty under those counts pursuant to Article 7(3) of the Statute for having failed to take the necessary and reasonable measures to prevent the acts of torture committed subsequent to those inflicted on Ekrem Zeković and for having failed to investigate the acts of torture committed prior to those inflicted on Ekrem Zeković and, if need be, punish the perpetrators. The convictions entered against Krnojelac under counts 2 and 4 of the Indictment (torture) require the findings of guilt entered against him under counts 5 and 7 (inhumane acts and cruel treatment) to be reversed for the following facts: paragraphs 5.21 (for FWS-73), 5.23, 5.27 (for Nurko Nisić and Zulfo Veiz), 5.28 and 5.29 (for Aziz Šahinović) of the Indictment and facts described under points B4, B14, B22, B31, B52 and B57 of Schedule C of the Indictment, on the ground that the crime of torture subsumes the crimes of inhumane acts and cruel treatment.[236] The possibility of multiple convictions based on the same facts is thus eliminated.

2. Fourth ground of appeal: error in the Trial Chamber's findings of fact regarding the murders committed at the KP Dom

173. The Prosecution challenges paragraph 348 of the Judgment, which reads as follows:

> Finally the Prosecution alleges that the Accused incurred superior responsibility for the deaths at the KP Dom pursuant to Article 7(3). The position of the Accused as the warden of the KP Dom and his power to prevent and punish crimes has already been determined by the Trial Chamber. The Trial Chamber is not satisfied that the Prosecution has established that the Accused incurred superior responsibility for the killings that occurred at the KP Dom during the months of June and July 1992. The Trial Chamber accepts that the Accused had knowledge of two deaths, the suicide of Juso Džamalija, and the suspicious death of Halim Konjo. The Trial Chamber is also satisfied that the Accused had been told by RJ about beatings and disappearances which were occurring in the month of June 1992. However the Trial Chamber is not satisfied that this was sufficient information in the possession of the Accused to put him on notice that his subordinates were involved in the murder of detainees. Accordingly, the Accused's responsibility as a superior for the killings that occurred at the KP Dom during the months of June and July 1992 has not been established.[237]

174. The Prosecution submits that the only reasonable conclusion the Trial Chamber could have reached on the basis of its findings of fact was that sufficient information was available to Krnojelac to put him on notice of the risk that his subordinates were involved in the murder of the detainees.[238] The Prosecution maintains that there were clear and objective indicators of the murders being committed at the KP Dom,[239] such as the number of victims, the blood stains

[235] *Rutaganda* Appeals Judgement, para. 580.
[236] As, moreover, the Trial Chamber acknowledged in paragraph 314 of the Judgment.
[237] Footnotes omitted.
[238] Prosecution Brief, paras. 5.11 and 5.13; T(A), 14 May 2003, p. 120.
[239] Prosecution Brief, para. 5.14.

PURL: https://www.legal-tools.org/doc/46d2e5/

spattered along the corridors of the KP Dom, the sounds of the beatings and the screams of the victims, which could be heard by the other detainees, the sound of shots, the removal of the victims' bodies by the guards and the bullet holes in the entrance walls.[240]

175. The Prosecution asserts that, taken as a whole, these facts constitute alarming information which should have prompted Krnojelac to open an investigation which would have led him to discover that murders were being committed at the KP Dom.[241] It argues that the Trial Chamber's findings in paragraph 318 of the Judgment relating to Krnojelac's position as warden of the KP Dom and his authority to prevent the beatings inflicted by his subordinates and punish the perpetrators also apply to the killings these people committed since the killings were committed in close connection with the beatings.[242] The Prosecution further recalls that the Trial Chamber reiterated its findings on this point in the section of the Judgment dealing with killings, notably in paragraph 348.[243] It adds that Krnojelac had continuous and unfettered access to the KP Dom and had the opportunity to observe the consequences that the beatings had on the detainees, as specified in paragraph 311 of the Judgment.[244]

176. As with the previous ground, the Appeals Chamber considers that the relevant facts accepted by the Trial Chamber with respect to the murders first need to be restated:

- The persons listed in Schedule C who were killed at the KP Dom fell within a pattern of events that occurred at the KP Dom during the months of June and July 1992,[245] and the only reasonable explanation for the disappearance of these persons since that time is that they died as a result of acts or omissions, with the relevant state of mind, at the KP Dom.[246] All of the deceased persons listed in Schedule C were either beaten to death, shot, or died later as a result of the injuries inflicted by the beating in one of the isolation cells of the KP Dom;[247]

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240 The Prosecution cites paragraphs 46, 334 and 335 of the Judgment.
241 Prosecution Brief, para. 5.17; Prosecution Reply, para. 5.7. The Prosecution argued: "[i]t is a case of looking at the entire information that is available and coming to the conclusion that there was a sufficiency of information that would have in fact activated and triggered a need for further investigation". See T(A), 14 May 2003, p. 119. These different indicators cannot be considered in isolation, rather the cumulative effect of the different indicators must be examined. See Prosecution Reply, para. 5.4. The Defence submitted that: "[…] all these things that the Prosecution relies on cannot be interpreted as information that was adequate and necessary to start an investigation for crimes […]". See T(A), 14 May 2003, p. 167.
242 Prosecution Brief, para. 5.12.
243 *Ibid.*, para. 5.7.
244 *Ibid.*, para. 5.15; T(A), 14 May 2003, pp. 119 and 120.
245 The Trial Chamber considered that it had only been established that the murders were committed between June and July 1992. See Judgment, para. 331.
246 Judgment, para. 330.
247 *Ibid.*, para. 336.

PURL: https://www.legal-tools.org/doc/46d2e5/

- Krnojelac was present at the KP Dom during this period in which the beatings and subsequent killings occurred only until 24 June 1992, and he did not return until about 2 or 3 July 1992;[248]

- The pattern established by the evidence is as follows: During the months of June and July 1992, KP Dom guards went to the rooms of the detainees after the roll call and called out from a list the names of individuals to accompany them for interrogations. The list from which the names were called was handed by the guard at the administration entrance to the guard in the compound of the KP Dom. The persons called out were taken from their rooms to the metal gate at the entrance to the administration building and lined up outside the administration building. One by one, or in small groups, they were called into a ground floor room of that building. They were taken into one of the rooms on the left and right hand sides of the staircase, or into a room marked "Tel" on Exhibit P 6 which was situated in the left wing of the administration building, or the next room. There they were often beaten. The beatings lasted well into the evening and the sounds of the beating and the screams of the victims could be heard by other detainees at the KP Dom. Some witnesses identified the person who was being beaten from the screams or from the victim's pleas or from questions asked of the victim during the beating. In addition, some witnesses partially observed the beating of one or more of the victims through a window of the room where they were detained. These witnesses identified among the principal offenders of the beating some of the KP Dom guards;[249]

- In some instances, the sound of pistol shots was heard, and then the sound of a vehicle with a faulty exhaust pipe was heard being started in front of the KP Dom;[250]

- During and after the beatings, guards of the KP Dom were seen carrying blankets into the administration building and removing what appeared to be bodies in those blankets. Blood and bloodied instruments were seen in the rooms where the beatings occurred. Traces of blood were seen on the Zastava Kedi vehicle with the faulty exhaust pipe which was heard leaving the KP Dom after one or more of the beatings. Bullet holes were observed in the walls of the hall behind the metal door to the administration building;[251]

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[248] *Ibid.*, para. 332.
[249] *Ibid.*, para. 333.
[250] *Ibid.*, para. 334.
[251] *Ibid.*, para. 335.

PURL: https://www.legal-tools.org/doc/46d2e5/

- The guards of the KP Dom participated with the military in the killing of detainees at the KP Dom. The guards' acts involved beating, or shooting, the detainees, and they were done by those persons with an intention either to kill them or to inflict grievous bodily harm or serious injury, or in a reasonable knowledge that such acts were likely to cause death;[252]

- Krnojelac had knowledge that people were being beaten and were disappearing from the KP Dom during the evenings of the month of June 1992. Witness RJ told Krnojelac in the month of June 1992 that the detainees could hear the sounds of people being beaten in the administration building and that people were disappearing from the KP Dom overnight. He asked Krnojelac what had happened to a group of people who had disappeared overnight and was told not to ask, as he did not know;[253]

- It was not proven that Krnojelac knew that people being called out in the evenings of the month of June 1992 and disappearing from the KP Dom were being killed. Krnojelac had knowledge of only two deaths – the suicide of Juso Džamalija and the suspicious death of Halim Konjo. As regards this suspicious death, Krnojelac admitted that he knew about the death of Halim Konjo the morning after his death had occurred in June 1992 and did not deny that he told RJ about the death. His evidence was that he had been told by Jakonović that Konjo had committed suicide and that a commission had come and investigated the death. He said that it was only natural for him to tell his colleague about the death of Halim Konjo because there was no reason for him to hide it. No other evidence was adduced by the Prosecution to establish that Krnojelac was aware of the death of any other detainees, other than Juso Džamalija, who the Trial Chamber had already determined died as a result of suicide,[254] and whose death Krnojelac admitted being aware of.[255]

177. The Appeals Chamber does not consider the Trial Chamber's finding that the information available to Krnojelac was insufficient to put him on notice of his subordinates' involvement in the murder of detainees to be reasonable.

178. In paragraph 339 of the Judgment, the Trial Chamber concluded that 26 detainees died as a result of the acts of members of the military coming from outside into the KP Dom and of the

[252] *Ibid.*, para. 339.
[253] *Ibid.*, paras. 344 and 348.
[254] The Trial Chamber stated as follows regarding his death: "Juso Džamalija (C 6) committed suicide in an isolation cell of the KP Dom after a severe beating. The evidence concerning his death was equivocal. Some witnesses gave evidence that he was depressed about his family situation and committed suicide for that reason. The Trial Chamber is not satisfied that the Prosecution has established beyond reasonable doubt that the beating inflicted on the victim at the KP Dom was the cause of the victim's suicide." See Judgment, para. 342.
[255] Judgment, paras. 345 and 348.

PURL: https://www.legal-tools.org/doc/46d2e5/

guards of the KP Dom. Although the facts accepted by the Trial Chamber do not necessarily mean that Krnojelac *knew* that murders were being or might be being committed by his subordinates, they do mean that Krnojelac *had reason to know* that murders were being or might be being committed by his subordinates. Thus, as shown by the Prosecution, the Appeals Chamber considers that no reasonable trier of fact could fail to conclude that a certain amount of information was available to Krnojelac which, taken as a whole, was sufficiently alarming and was such as to alert him to the risk of murders being committed inside the prison. First, it appeared that the detainees died as a result of the beatings committed within the KP Dom. As the Trial Chamber observed, all of the deceased persons listed in Schedule C were either beaten to death, shot, or died later as a result of the injuries inflicted by the beating in one of the isolation cells of the KP Dom. The Appeals Chamber refers back to the facts accepted by the Trial Chamber - as set out for the previous ground of appeal - regarding the context in which the beatings were committed, the widespread nature of these beatings and Krnojelac's jurisdiction as prison warden over his subordinates, who were the perpetrators of these beatings.[256] The Trial Chamber indicated that, in view of the widespread nature of the beatings at the KP Dom and the obvious resulting marks on the detainees, Krnojelac could not have failed to learn of them, although he denies it. Furthermore, the Appeals Chamber recalls that the Trial Chamber noted that Krnojelac was aware that detainees were disappearing. The Trial Chamber accepted that, in the month of June 1992, witness RJ told Krnojelac that the detainees could hear the sounds of people being beaten in the administration building and that people were disappearing from the KP Dom overnight. Lastly, the Appeals Chamber is of the opinion that Krnojelac was in a position to see the blood stains spattered along the corridors of the KP Dom and the bullet holes in the walls of the entrance to the administration building. As the Trial Chamber stated, the Accused went to the KP Dom almost every day of the working week. While there he would go to the canteen, the prison yard or elsewhere inside the compound, all places where he had ample opportunity to notice the physical condition of the non-Serb detainees. There can therefore be no doubt that he was also in a position to see the blood stains and bullet holes marking the walls.

179. The Appeals Chamber holds that these facts constitute sufficiently alarming information such as to require Krnojelac to carry out an additional investigation. Given that he was aware of the beatings and suspicious disappearances and that he saw the bullet holes in the walls, Krnojelac was in a position to ascertain that the perpetrators of the beatings may have committed murders. At the very least, he should have carried out an investigation. The Appeals Chamber holds that no reasonable trier of fact could have reached the findings of fact made by the Trial Chamber.

[256] See paragraphs 163 *ff.* of this Judgement.

PURL: https://www.legal-tools.org/doc/46d2e5/

Accordingly, the Appeals Chamber considers that the Trial Chamber committed an error of fact which, for the above reasons,[257] occasioned a miscarriage of justice.

180. The Appeals Chamber considers that, in order to correct the Trial Chamber's error, the acquittals under counts 8 and 10 of the Indictment must be reversed and Krnojelac found guilty pursuant to Article 7(3) of the Statute for having failed to take the necessary and reasonable measures to prevent the murders committed subsequent to the disappearances of which he had knowledge and for having failed to investigate the murders committed prior to those disappearances and, if need be, punish the perpetrators of the murders, of whom he was the superior.

D. The Prosecution's fifth ground of appeal: the Trial Chamber committed an error of fact when it found that the beatings constituting inhumane acts and cruel treatment were not inflicted on discriminatory grounds and that Krnojelac could not therefore be held responsible for persecution as a superior

181. The Prosecution submits that the Trial Chamber erred in concluding that the beatings constituting inhumane acts and cruel treatment inflicted by the guards on detainees at the KP Dom were not committed on discriminatory grounds and that they did not therefore constitute persecution for which Krnojelac could incur responsibility as a superior under Article 7(3) of the Statute.[258]

182. The Prosecution argues that the Trial Chamber took an unduly restrictive approach to the question of what constitutes discrimination and failed to consider the broader context in which the underlying acts took place.[259] According to the Prosecution, the Trial Chamber arbitrarily compartmentalised the incidents pleaded as persecution in the Indictment and lost sight of the overall discriminatory nature of the KP Dom environment. The nature of the environment was

[257] See para. 172 of this Judgement.
[258] Prosecution Notice of Appeal, pp. 4 and 5; Prosecution Brief, para. 6.1. It should be noted that, in the Judgment, the Trial Chamber held that only "the following acts of torture, inhumane acts or cruel treatment were carried out on discriminatory grounds: Indictment paras. 5.15 and 5.23 (FWS-03 only)". See Judgment, para. 465.
[259] Prosecution Brief, para. 6.4. The Prosecution maintains that the Trial Chamber disregarded the systematic nature of the discrimination against the non-Serbs at the KP Dom. It recalls that, in order to assess whether a particular act was committed with discriminatory intent, the Trial Chamber compared the treatment accorded to the non-Serb detainees with the treatment accorded to the Serb detainees. Where the Trial Chamber found a difference in the treatment of those two groups, it concluded that there was discrimination on political or religious grounds. In order to determine whether or not there was discrimination, the Chamber apparently adopted the principle of formal equality (according to which similarly situated persons should be treated the same) discussed in the *Andrews v. Law Society of British Columbia* case brought before the Supreme Court of Canada ([1989] 1 S.C.R., pp. 163 to 172). The Prosecution cites paragraphs 438 and 441 to 443 of the Judgment (See Prosecution Brief, para. 6.5). It states that, in this case, there was, coincidentally, a group of Serb detainees in the KP Dom against which the Trial Chamber could, and to some degree did, compare the treatment of the non-Serb detainees at the KP Dom. However, had there not been such a group, the Trial Chamber would have had difficulty concluding that the non-Serbs were subjected to grossly inadequate living conditions on discriminatory grounds. However, the comparison is not possible in all of the cases brought before the Tribunal, which illustrates the inadequacy of the restrictive approach. See Prosecution Brief, para. 6.8.

PURL: https://www.legal-tools.org/doc/46d2e5/

moreover amply illustrated in the Trial Chamber's findings.[260] The beatings inflicted upon the detainees at the KP Dom were discriminatory because they were carried out in a widespread and systematic manner for the purpose of punishing, disadvantaging and oppressing the non-Serb detainees because of their ethnicity.[261] The Prosecution states that, even when using the restrictive approach taken by the Trial Chamber, it is unreasonable to conclude that the beatings were not discriminatory. On this point, it reproduces the Trial Chamber's finding in paragraph 47 of the Judgment in which the Chamber states that the Serb convicts, who were kept in a different part of the building from the non-Serbs, "were not beaten or otherwise abused". The only reasonable conclusion to be drawn from this finding is that the beatings inflicted upon the non-Serbs were carried out on a discriminatory basis given that the Serbs themselves were not subjected to beatings.[262] In any event, and more fundamentally, the Prosecution submits that the treatment of the non-Serbs at the KP Dom need not have been compared with the treatment of another group.[263] It contends that, given the spirit of discrimination against the non-Serbs prevailing at the KP Dom, the Trial Chamber should have reasonably *inferred*, in the absence of evidence to the contrary, that most of the acts committed by the KP Dom guards were perpetrated on discriminatory grounds.[264]

183. Even though, in its Brief, the Prosecution appears to raise the issue of the Trial Chamber's definition of a discriminatory act articulated in respect of the facts of the case, it actually seems to challenge the Trial Chamber's treatment of the specific issue of discriminatory intent, i.e. the *mens rea* as opposed to the *actus reus* of the offence.[265] The Appeals Chamber will therefore address the issue of whether it was unreasonable for the Trial Chamber to conclude that only the acts of torture, inhumane acts or cruel treatment set out in paragraphs 5.15 and 5.23 of the Indictment (FWS-03 only) were carried out on discriminatory grounds.[266]

184. The Appeals Chamber reiterates that, in law, persecution as a crime against humanity requires evidence of a specific intent to discriminate on political, racial or religious grounds and that it falls to the Prosecution to prove that the relevant acts were committed with the requisite

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[260] The Prosecution refers to paragraphs 27 to 33, 34, 39, 41, 42, 116, 118 to 124, 134, 135, 138, 139, 141, 142, 143, 330 to 342, 438, 440, 441 and 443 of the Judgment. See Prosecution Brief, paras. 6.9 to 6.19.
[261] Prosecution Brief, paras. 6.21 to 6.23.
[262] *Ibid.,* para. 6.22.
[263] *Ibid.*, para. 6.23.
[264] *Ibid.*, para. 6.34.
[265] The Prosecution's submissions as they are set out in its Brief are somewhat equivocal on this point. In paragraphs 6.3 to 6.8 of its Brief, the Prosecution essentially alleges that the Trial Chamber "took an unduly […] restrictive approach to the question *of what constitutes discrimination* and failed to consider adequately the broader context in which the underlying acts took place". (See para. 6.4, emphasis added). The remainder of the Brief, though, appears to address the issue of the discriminatory intent behind the acts committed (See paras. 6.20 to 6.35). It should moreover be noted that the findings of the Trial Chamber challenged by the Prosecution all relate to the issue of discriminatory intent.
[266] Judgment, para. 465.

PURL: https://www.legal-tools.org/doc/46d2e5/

discriminatory intent. The Appeals Chamber may not hold that the discriminatory intent of beatings can be inferred directly from the general discriminatory nature of an attack characterised as a crime against humanity.[267] According to the Appeals Chamber, such a context may not in and of itself evidence discriminatory intent. Even so, the Appeals Chamber takes the view that discriminatory intent may be inferred from such a context as long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent. Circumstances which may be taken into consideration include the operation of the prison (in particular, the systematic nature of the crimes committed against a racial or religious group) and the general attitude of the offence's alleged perpetrator as seen through his behaviour.

185. Additionally, the Appeals Chamber considers that the fact that such circumstances may allow the *actus reus* of persecution (i.e. the discriminatory nature of an act) to be established does not preclude a Trial Chamber from giving consideration to those circumstances, as well as other factors, to establish the *mens rea* of the offence, that is the discriminatory intent on the basis of which the discriminatory act was committed. On this point, the Appeals Chamber notes that the Trial Chamber correctly defined the crime of persecution as it appears in paragraph 431 of the Judgment. It reads: "[…] the crime of persecution consists of an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)."[268] However, the Appeals Chamber does not agree with the interpretation given to this definition in paragraph 432 of the Judgment, particularly in footnote 1293 which reads as follows:

> The crime of persecution, the only crime in the Statute which must be committed on discriminatory grounds (see *Tadić* Appeal Judgment, par 305), has as its object the protection of members of political, racial and religious groups from discrimination on the basis of belonging to one of these groups. If a Serb deliberately murders someone on the basis that he is Muslim, it is clear that the object of the crime of persecution in that instance is to provide protection from such discriminatory acts to members of the Muslim religious group. If it turns out that the victim is not Muslim, to argue that this act amounts nonetheless to persecution if done with a discriminatory intent needlessly extends the protection afforded by that crime to a person who is not a member of the listed group requiring protection in that instance (Muslims).

The Appeals Chamber finds this assertion to be incorrect. It is an erroneous interpretation of the requirement for discrimination in fact (or a discriminatory act) established by the case-law. To use the example provided in the footnote, the Appeals Chamber considers that a Serb mistaken for a Muslim may still be the victim of the crime of persecution. The Appeals Chamber considers that the

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[267] It should be noted that not every attack against a civilian population is necessarily discriminatory. Moreover, the discriminatory character is not an constituent element of an attack against a civilian population.
[268] Footnotes omitted.

PURL: https://www.legal-tools.org/doc/46d2e5/

act committed against him institutes discrimination in fact, *vis-à-vis* the other Serbs who were not subject to such acts, effected with the will to discriminate against a group on grounds of ethnicity.

186. In this case, the Trial Chamber indicated that the "detention of non-Serbs in the KP Dom, and the acts or omissions which took place therein, were clearly related to the widespread and systematic attack against the non-Serb civilian population in the Foča municipality."[269] The Appeals Chamber holds that it may be inferred from this finding that the treatment meted out to the non-Serb detainees was the consequence of the aforementioned discriminatory policy at the root of their detention.[270] Furthermore, the Appeals Chamber recalls the Trial Chamber's findings in paragraph 47 of the Judgment:

> The few Serb convicts who were detained at the KP Dom were kept in a different part of the building from the non-Serbs. They *were not mistreated like the non-Serb detainees*. The quality and quantity of their food was somewhat better, sometimes including additional servings. *They were not beaten or otherwise abused*, they were not locked up in their rooms, they were released once they had served their time, they had access to hygienic facilities and enjoyed other benefits which were denied to non-Serb detainees.[271]

The Appeals Chamber observes that this finding shows that only the non-Serb detainees were, in actual fact, subject to beatings. It holds that the differences in the way that the Serb and non-Serb detainees were treated cannot reasonably be attributed to the random posting of the guards. This finding therefore confirms the above presumption. Accordingly, the Appeals Chamber considers that the only reasonable finding that could be reached on the basis of the Trial Chamber's relevant findings of fact was that the beatings were inflicted upon the non-Serb detainees because of their political or religious affiliation and that, consequently, these unlawful acts were committed with the requisite discriminatory intent. The Appeals Chamber considers that, even if it were to be assumed that the blows inflicted upon the non-Serb detainees were meted out in order to punish them for violating the regulations, the decision to inflict such punishment arose out of a will to discriminate against them on religious or political grounds since punishment was only inflicted upon non-Serb detainees.

187. The Prosecution submits that Krnojelac should be found guilty pursuant to Article 7(3) of the Statute for the acts of persecution committed.[272] The Appeals Chamber restates that the Trial Chamber acknowledged that Krnojelac had voluntarily accepted his position in full awareness that non-Serb civilians were being illegally detained at the KP Dom because of their ethnicity.[273]

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[269] Judgment, para. 50.
[270] *Ibid.*, para. 438.
[271] Footnotes omitted (emphasis added).
[272] Prosecution Brief, paras. 6.38 and 6.40.
[273] Judgment, para. 100.

PURL: https://www.legal-tools.org/doc/46d2e5/

Furthermore, Krnojelac admitted that he knew that the non-Serb detainees were detained because they were non-Serbs and that he knew that none of the procedures in place for legally detained persons was ever followed at the KP Dom.[274] The Trial Chamber found that Krnojelac knew that non-Serb detainees were being beaten and generally mistreated.[275] He "knew about the conditions of the non-Serb detainees, the beatings and the other mistreatment to which they were subjected while detained at the KP Dom, and […] he knew that the mistreatment which occurred at the KP Dom was part of the attack upon the non-Serb population of Foča town and municipality."[276] In view of all the foregoing, the Appeals Chamber considers that Krnojelac who, as prison warden, retained jurisdiction over all detainees in the KP Dom[277] had sufficient information to alert him to the risk that inhumane acts and cruel treatment were being committed against the non-Serb detainees because of their political or religious affiliation. The Trial Chamber therefore committed an error of fact which occasioned a miscarriage of justice.[278]

188. The Appeals Chamber considers that, in order to correct the Trial Chamber's error, Krnojelac must be found guilty under count 1 of the Indictment (persecution), as requested by the Prosecution,[279] in order to reflect his liability pursuant to Article 7(3) of the Statute for the beatings described in paragraphs 5.9, 5.16, 5.18, 5.20, 5.21, 5.27 and 5.29 of the Indictment and the facts corresponding to numbers A2, A7, A10, A12, B15, B17, B18, B19, B20, B21, B25, B26, B28, B30, B33, B34, B37, B45, B46, B48, B51 and B59 in Schedule C of the Indictment, since the Trial Chamber viewed all of these beatings as inhumane acts and cruel treatment under Articles 5(i) and 3 of the Statute respectively.[280] Consequently, the convictions entered against Krnojelac under count 5 of the Indictment (crime against humanity of inhumane acts) for the above beatings must be reversed since the crime of persecution in the form of inhumane acts subsumes the crime against humanity of inhumane acts. The possibility of multiple convictions based on the same facts is thus eliminated. Krnojelac's liability under count 7 of the Indictment based on the above beatings is confirmed.

[274] *Ibid.*, para. 124.
[275] *Ibid.*, para. 308.
[276] *Ibid.*, para. 62.
[277] *Ibid.*, para. 102.
[278] See the findings regarding miscarriages of justice recapitulated above. See para. 172 of this Judgement.
[279] Prosecution Brief, paras. 6.2 and 6.36. The Prosecution requests that the sentence be revised upwards commensurably (See Prosecution Brief, paras. 6.36 to 6.40).
[280] Judgment, para. 320.

PURL: https://www.legal-tools.org/doc/46d2e5/

F. The Prosecution's sixth ground of appeal: the Trial Chamber erred in acquitting Krnojelac on the count of persecution (forced labour)

189. Under counts 16 and 18 of the Indictment, Krnojelac was charged with enslavement as a crime against humanity pursuant to Article 5(c) of the Statute and with slavery as a violation of the laws or customs of war pursuant to Article 3 of the Statute.[281] The charges of enslavement and slavery and the charges of persecution under count 1 (forced labour) were underpinned by the same facts.[282] The Trial Chamber found that the Prosecution had failed to establish, with two exceptions, that the work performed by the detainees was forced or involuntary.[283] The Trial Chamber further held that Krnojelac was not criminally responsible for the forced labour of these two detainees under either Article 7(1) or Article 7(3) of the Statute.[284] The Chamber accordingly acquitted Krnojelac on counts 16 and 18 of the Indictment (enslavement and slavery) and on count 1 (persecution in the form of forced labour).[285]

190. The Prosecution requests that the acquittal on count 1 of the Indictment be reversed for the following two principal reasons.[286]

1. There was sufficient evidence that the labour was involuntary and to establish involuntary labour as a form of persecution

(a) The Trial Chamber erred in finding that there was insufficient evidence that the labour was involuntary

191. The Prosecution claims that, by using the involuntary test as a legal criterion here, the Trial Chamber erroneously decided in the case of eight detainees[287] that the evidence adduced was insufficient to conclude that they had been forced to work.[288] The Trial Chamber correctly held that, generally, the prohibition in international humanitarian law is against forced or involuntary labour –

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[281] *Ibid*., para. 10.
[282] *Ibid.*, para 471.
[283] *Ibid*., paras. 361 to 424.
[284] *Ibid*., paras. 428 and 429.
[285] *Ibid*., paras. 425 to 430. In paragraph 471 of the Judgment, the Trial Chamber stated in connection with the allegation of persecution: "The Prosecution charges 'the prolonged and frequent forced labour of Muslim and other non-Serb male civilian detainees at KP Dom' as persecution. Although forced labour is not separately charged as such, it forms the basis of the charges of enslavement and slavery and has already been considered by the Trial Chamber in that context. In two instances, the Trial Chamber was satisfied that there was forced labour (the mine clearing by FWS-109 and Goran Kukavica). However, no criminal responsibility for that forced labour was attributed to the Accused. With respect to the other alleged incidents, no instances of forced labour were established. As a result, the Trial Chamber is not satisfied that there are any instances of forced labour which could support a charge of persecution."
[286] Prosecution Brief, para. 7.1.
[287] The Prosecution challenges the Trial Chamber's findings in respect of witnesses FWS-249, FWS-144, Rasim Taranin, FWS-66, FWS-198, Ekrem Zeković, Muhamed Lisica and FWS-71.
[288] Prosecution Brief, paras. 7.2 and 7.9.

PURL: https://www.legal-tools.org/doc/46d2e5/

the "involuntariness" aspect being the definitional feature of forced or compulsory labour.[289] The Prosecution accepts that, overall, the Trial Chamber gave a legally correct definition of "involuntariness"[290] but asserts that it applied that definition to the facts erroneously. In its view, lack of consent may be established from the objective circumstances without specific proof of the victim's subjective state of mind. However, contrary to the defined test, the Trial Chamber required the Prosecution to prove that the detainee had "objected to working or […] had been told by a person in authority that he would be punished if he did not."[291] Similarly, the Trial Chamber erred in requiring the Prosecution to prove not only that the detainee was afraid to refuse work but also that he did not want to work.[292] The Prosecution nonetheless maintains that even where there is no direct evidence from a detainee that his labour was not voluntary, the Trial Chamber must take into consideration other objective circumstances that were so coercive as to negate any possibility of consent.[293] If available, evidence which establishes the victim's subjective state of mind and relates to the facts underpinning his belief that he was forced to work is clearly relevant. Such evidence may of itself be sufficient to establish lack of consent or may be evidence supporting a finding that the objective circumstances were such as to negate any possibility of consent. That said, the Prosecution argues that such evidence is not essential and that the existence of circumstances negating any possibility of consent may also be proved by other evidence.[294] The Trial Chamber took into account a number of factors it considered relevant, such as the substantially uncompensated aspect of the labour performed, the vulnerable position in which the detainees found themselves, the allegations that detainees who were unable or unwilling to work were either forced to do so or put in solitary confinement, claims of longer term consequences of the labour, the fact of detention and the inhumane living conditions at the KP Dom.[295] However, the Prosecution contends that whilst all of these factors may be relevant in determining whether there were circumstances that were so coercive as to negate any possibility of consent, none of these factors is of itself essential if the existence of lack of consent can be established from other objective circumstances. It submits that most or all of these factors were present in the case of each of the detainees concerned.

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[289] The Prosecution refers to paragraph 359 of the Judgment.
[290] Prosecution Brief, paras. 7.3 to 7.8. The Prosecution "does not challenge the Trial Chamber's articulation of the test of voluntariness, adopted from the context of sexual offences". See Prosecution Brief, para. 7.5.
[291] *Ibid.*, para. 7.10, citing paragraph 380 of the Judgment.
[292] *Ibid.*, para. 7.10, citing paragraphs 385 and 386 of the Judgment.
[293] *Ibid.*, para. 7.11. The Prosecution adds that: "In ascertaining real choice, the Trial Chamber should have gone beyond what the detainees said, what they did, and examined the detainees' motivations which in this case -- in this case the motivations are also corroborated by the objective coercive circumstances." See T(A), 14 May 2003, p. 110.
[294] Prosecution Brief, paras. 7.11 and 7.12.
[295] Judgment, para. 373.

PURL: https://www.legal-tools.org/doc/46d2e5/

192. In view of all the testimony on the point, the Trial Chamber did not believe that, in this case, "the general circumstances in the KP Dom during the Accused's administration were of such a nature as to render the work of every detainee involuntary"[296] or, stated otherwise, that the objective circumstances were so coercive as to negate any possibility of consent. The Prosecution submits that the only reasonable conclusion open to a trier of fact on the evidence before the Trial Chamber in this case was that the conditions in the KP Dom were so coercive as to negate any possibility of consent by the workers unlawfully detained there.[297]

193. The Appeals Chamber understands that the Prosecution wants it first to address the issue of whether the conditions at the KP Dom were so coercive as to exclude any possibility of consent by the workers. As it has done for the previous grounds, in order to respond to this issue, the Appeals Chamber will recapitulate the relevant facts accepted by the Trial Chamber:

- The KP Dom held several hundred Muslim civilian men, who were detained there for periods lasting from four months to more than two and a half years.[298] The KP Dom had the capacity to house more than the maximum 500-700 non-Serbs detained, but the detainees were crowded into a small number of rooms. Solitary confinement cells designed to hold one person were packed with up to 18 people at a time, making it impossible for the detainees to move around the cell, or to sleep lying down;[299]

- The conditions under which non-Serbs were detained were below any legal standard regulating the treatment of civilians in times of armed conflict. Non-Serb detainees were given insufficient food, as a result of which many of them suffered substantial weight loss, sometimes more than 40 kilograms or up to a third of their weight. They were kept in various rooms, including solitary confinement cells, which were not heated and were extremely cold during the harsh winter of 1992. Clothes which they had made from spare blankets to keep warm were confiscated by guards.[300] There was a deliberate policy to feed the non-Serb detainees barely enough for their survival. All non-Serb detainees suffered considerable weight loss ranging from 20 to 40 kilograms during their detention at the KP Dom;[301]

- Hygienic conditions were deplorable and washing facilities minimal, while medical care was inadequate and medicine in very short supply. A basic medical service was provided but those

[296] *Ibid.*, para. 372.
[297] Prosecution Brief, para. 7.18.
[298] Judgment, para. 40.
[299] *Ibid.*, para. 135.
[300] *Ibid.*, para. 43.
[301] *Ibid.*, para. 139.

PURL: https://www.legal-tools.org/doc/46d2e5/

in need of urgent medical attention were left unattended or given insufficient treatment. At least one detainee died as a result of the lack of or late medical care;[302]

- Non-Serb detainees were locked up in their rooms for most of the day, being allowed out only to go to the canteen and back. Some, however, were taken out to work knowing that they would receive additional and much needed food if they did;[303]

- Many of the detainees were subjected to beatings and other forms of mistreatment, sometimes for no reason, sometimes as a punishment for minor breaches of the prison regulations or in order to obtain information or a confession from them. The screams and moans of those being beaten could be heard by other detainees, instilling fear among all the detainees. Many were returned to their rooms with visible wounds and bruises resulting from the beating;[304]

- Many non-Serb detainees were taken out of the KP Dom during the period covered by the Indictment, allegedly to be exchanged or in order to carry out certain tasks such as picking plums. Many of them did not come back and were never seen again;[305]

- Brutal and deplorable living conditions were imposed upon the non-Serb detainees at the KP Dom in the period from April 1992 to July 1993. They constituted acts and omissions of a seriousness comparable to the other crimes enumerated under Article 3 and Article 5 of the Statute and amount to inhumane acts and cruel treatment under those articles;[306]

- There was a deliberate policy of isolating detainees within the KP Dom. Only those detainees given work assignments were permitted to spend prolonged periods outside of their rooms. Detainees who were taken to work assignments outside of the KP Dom were kept isolated in a separate room to prevent news about the "outside world" from spreading among the other detainees. To ensure compliance with these unwritten "rules" on communication, violations were punished with solitary confinement and/or mistreatment, such as beatings;[307]

- The overcrowding in the prison was aggravated by the poor hygienic conditions;[308]

- The conditions of detention were physically taxing and the non-Serb detainees were generally subject to a psychologically exhausting regime while detained at the KP Dom. Any attempts

[302] *Ibid.*, para. 44.
[303] *Ibid.*, para. 45.
[304] *Ibid.*, para. 46.
[305] *Ibid.*, para. 48.
[306] *Ibid.*, para. 133.
[307] *Ibid.*, para. 134.

PURL: https://www.legal-tools.org/doc/46d2e5/

made by non-Serb detainees to improve their living conditions in the camp were punished with solitary confinement. Acts which resulted in beatings or periods in the isolation cells included efforts to get additional food, or access to warm water, and attempts to communicate with each other, the guards, or the outside world;[309]

- The non-Serb detainees were subjected to harrowing psychological abuse during their period of detention at the KP Dom. The detainees were exposed to the sounds of torture and beatings over a period of months, in particular in June and July 1992, and they constantly feared that they would be the next to be selected;[310]

- On the whole, it appears that there was a small core group of detainees and convicts who mostly worked on the farm, at the metal workshop or at the furniture factory during Krnojelac's administration. This core group of detainees may have numbered between 20 and 45. The detainees who worked were generally skilled and able to work;[311]

- When reasons were given, they were mainly that the detainee wished to obtain the extra food given to workers or to escape from his room;[312]

- The detainees had to work in the metal workshop, repairing army vehicles or looted cars. The number of people working in and for the workshop numbered between about six and fifteen. Apart from a snack, which all the KP Dom detainees who worked received, and cigarettes that Goljanin and sometimes the guards gave them, the metal workers had slightly more freedom than other working detainees, and they were sometimes able to get pears from trees near to the workshop.[313]

The Trial Chamber was not satisfied that those detainees who refused to or could not work were sent to solitary confinement during Krnojelac's administration. The evidence adduced by the Prosecution to demonstrate this allegation was equivocal.[314] Likewise, there was no direct evidence adduced by the Prosecution that those who could not or were unwilling to work were forced to do so during Krnojelac's administration.[315]

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[308] *Ibid.*, para. 136.
[309] *Ibid.*, para. 142.
[310] *Ibid.*, para. 143.
[311] *Ibid.*, para. 365.
[312] *Ibid.*, para. 380.
[313] *Ibid.*, para. 384.
[314] *Ibid.*, para. 375.
[315] *Ibid.*, para. 376.

PURL: https://www.legal-tools.org/doc/46d2e5/

194. The Prosecution asserts that none of the evidence showed that the detainees benefited from working at the KP Dom or that their detention conditions improved in any significant manner and it argues that the only reasonable inference from the evidence was that detainees who volunteered to work did so because they were in constant fear of repercussions and were attempting to escape the brutal and deplorable living conditions. The Appeals Chamber notes that the living conditions at the KP Dom were clearly appalling. Of the facts set out above, some are particularly significant and should be emphasised. The Trial Chamber concluded that, at the KP Dom, there was a deliberate policy to feed the non-Serb detainees barely enough for their survival. All non-Serb detainees suffered considerable weight loss ranging from 20 to 40 kilograms during their detention at the KP Dom. Moreover, non-Serb detainees were locked up in their rooms for most of the day, being allowed out only to go to the canteen and back. Some, however, were taken out to work knowing that they would receive additional and much needed food if they did. Finally, the non-Serb detainees were subjected to harrowing psychological abuse during their period of detention at the KP Dom. The detainees were exposed to the sounds of people being beaten and tortured over a period of months, in particular in June and July 1992, and they constantly feared that they would be the next to be selected. The Appeals Chamber holds that, given the specific detention conditions of the non-Serb detainees at the KP Dom, a reasonable trier of fact should have arrived at the conclusion that the detainees' general situation negated any possibility of free consent. The Appeals Chamber is satisfied that the detainees worked to avoid being beaten or in the hope of obtaining additional food. Those who refused to work did so out of fear on account of the disappearances of detainees who had gone outside of the KP Dom. The climate of fear made the expression of free consent impossible and it may neither be expected of a detainee that he voice an objection nor held that a person in a position of authority need threaten him with punishment if he refuses to work in order for forced labour to be established. In such circumstances, the fact that a detainee raised an objection is immaterial in ascertaining whether it was truly impossible to object.

195. The Appeals Chamber holds that the specific circumstances of the KP Dom detainees' prison life were therefore such as to make free consent impossible. The Appeals Chamber notes that, in this case, most of the witnesses called by the Prosecution in support of its ground of appeal expressed an opinion on the issue of whether they felt forced to work. On this point, the Appeals Chamber rejects the Prosecution's argument that evidence which establishes the victim's subjective state of mind and relates to the facts indicating that he was forced to work is clearly relevant and may of itself be sufficient to establish lack of consent. The Appeals Chamber takes the view that such an opinion is not sufficient to establish forced labour and that the detainees' personal conviction that they were forced to work must be proven with objective and not just subjective

PURL: https://www.legal-tools.org/doc/46d2e5/

evidence. In this case, given the particular circumstances of the detention centre, there was sufficient objective evidence to prove that the detainees were in fact forced to work, thus bearing out their conviction that the labour they performed was forced.

196. Consequently, the Appeals Chamber sets aside the Trial Chamber's findings with respect to witnesses FWS-249, FWS-144, Rasim Taranin, FWS-66, FWS-198, Ekrem Zeković, Muhamed Lisica and FWS-71 and concludes that these witnesses were forced to work.

197. The Appeals Chamber will now analyse the Prosecution's second argument.

(b) If forced labour is established, the Trial Chamber's findings are sufficient to warrant Krnojelac's conviction for persecution based on forced labour

198. The Prosecution refers to the Trial Chamber's findings in paragraph 471 of the Judgment.[316] Here again, it does not challenge the applicable law set out by the Trial Chamber.[317] It argues that if the Appeals Chamber were to set aside the Trial Chamber's findings by holding that the detainees' labour was forced, other findings made by the Trial Chamber would amply bear out the discrimination shown in the selection of detainees compelled to perform forced labour and therefore fully justify a conviction for persecution based on that forced labour.

199. The Appeals Chamber reiterates that the acts underlying the crime of persecution, whether considered in isolation or in conjunction with other acts, must constitute a crime of persecution of gravity equal to the crimes listed under Article 5 of the Statute. It holds that, in these circumstances, forced labour must be considered as part of a series of acts comprising unlawful detention and beatings whose cumulative effect is of sufficient gravity to amount to a crime of persecution, given that the unlawful detention and beatings were based on one or more of the discriminatory grounds

[316] That paragraph reads as follows: "The Prosecution charges 'the prolonged and frequent forced labour of Muslim and other non-Serb male civilian detainees at KP Dom' as persecution. Although forced labour is not separately charged as such, it forms the basis of the charges of enslavement and slavery and has already been considered by the Trial Chamber in that context. In two instances, the Trial Chamber was satisfied that there was forced labour (the mine clearing by FWS-109 and Goran Kukavica). However, no criminal responsibility for that forced labour was attributed to the Accused. With respect to the other alleged incidents, no instances of forced labour were established. As a result, the Trial Chamber is not satisfied that there are any instances of forced labour which could support a charge of persecution."

[317] Prosecution Brief, para. 7.76. The Prosecution refers to paragraph 434 of the Judgment which reads as follows: "Not every act or omission denying a fundamental human right is serious enough to constitute a crime against humanity. While acts or omissions listed under other sub-paragraphs of Article 5 of the Statute are by definition serious enough, others (either listed under other articles of the Statute or not listed in the Statute at all) must meet an additional test. Such acts or omissions must reach the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute. This test will only be met by gross or blatant denials of fundamental human rights. When invoking this test, acts should not be considered in isolation but rather should be examined in their context and with consideration of their cumulative effect. Separately or combined, the acts must amount to persecution, though it is not required that each alleged underlying act be regarded as a violation of international law." (footnotes omitted).

PURL: https://www.legal-tools.org/doc/46d2e5/

listed under Article 5 of the Statute. Accordingly, the degree of gravity of persecution based on those acts is the same as that of the crimes expressly laid down under Article 5 of the Statute.

200. As the gravity test has been met, it is now appropriate to determine whether the acts committed were indeed discriminatory and whether they were committed with discriminatory intent. The Defence maintains that, far from proving the discriminatory nature of the tasks requested of the non-Serb prisoners, the evidence adduced at trial shows that the Serb prisoners were in the main made to perform the same tasks as the non-Serbs and that the use of essentially Muslim labour had become necessary because of the significant number of Serb men at the front. The Defence contends that the discrimination required by persecution has not therefore been established.[318] The Appeals Chamber disagrees. What must be borne in mind is the Trial Chamber's finding in paragraph 438 of the Judgment that the Serbs were legally imprisoned at the KP Dom, whereas the non-Serbs were detained for no lawful reason. It states: "[w]hile some Serbs were also held in the KP Dom, they were held legally, having been convicted by courts of law prior to the outbreak of the conflict or having been detained for military offences during the conflict. By contrast, the non-Serbs were not detained on any legal ground, nor was their continued confinement subject to review."[319] The Appeals Chamber holds that there can be no question of the Serb detainees being subjected to forced labour since their detention was legal. The Appeals Chamber considers that a comparison between the labour performed by the Serb detainees and that performed by the non-Serb detainees is immaterial here. There is a principle which states that the work required of a person in the ordinary course of lawful detention is not regarded as forced or compulsory labour. This principle is enshrined in, *inter alia*, Article 4(3) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). It sets out that "'forced or compulsory labour' shall not include: a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention [governing notably the lawfulness of an arrest or detention] or during conditional release from such detention."

201. Since the case of the Serb prisoners is irrelevant here, the issue of discrimination against the non-Serb detainees must be examined with reference to the objective facts of the case. The Appeals Chamber has already pointed out that, in this case, the Trial Chamber stated that the "detention of non-Serbs in the KP Dom, and the acts or omissions which took place therein, were clearly related to the widespread and systematic attack against the non-Serb civilian population in the Foča municipality."[320] The Appeals Chamber has also already indicated that it could be inferred from the

[318] Defence Response, para. 438.
[319] See also the Judgment, paras. 100 and 127.
[320] Judgment, para. 50.

PURL: https://www.legal-tools.org/doc/46d2e5/

context that the treatment meted out to the non-Serb detainees was the consequence of the aforementioned discriminatory policy at the root of their detention as long as, given the facts of the case, circumstances surrounding the commission of the acts of forced labour substantiated the existence of such intent. In the Appeals Chamber's opinion, there can be no doubt that the non-Serb prisoners were detained and forced to work on account of their ethnicity. The Trial Chamber emphasised that "[t]he few Serb convicts who were detained at the KP Dom were kept in a different part of the building from the non-Serbs. They were not mistreated like the non-Serb detainees. The quality and quantity of their food was somewhat better, sometimes including additional servings. They were not beaten or otherwise abused, they were not locked up in their rooms, they were released once they had served their time, they had access to hygienic facilities and enjoyed other benefits which were denied to non-Serb detainees."[321] It is clear, however, that the non-Serb detainees were subjected to a wholly different regime. The overcrowding of the solitary confinement cells in which the detainees were so packed that they were unable to move around or lie down, the starvation and its principal effects in terms of weight loss, the widespread nature of the beatings and mistreatment and the psychological abuse linked to the detention conditions and mistreatment constitute circumstances particularly indicative of the discriminatory character of the acts of forced labour imposed upon the non-Serb detainees.

202. The Appeals Chamber considers that the Trial Chamber was misled by its case-by-case approach to each of the acts of forced labour and that, consequently, it failed to take into consideration all of the circumstances surrounding the commission of these acts - circumstances which, in this instance, go to prove that the said acts did indeed form part of the discriminatory environment at the KP Dom, as did the unlawful detention and the beatings inflicted. The Appeals Chamber thus finds that, in the light of such circumstances, no reasonable trier of fact would have failed to conclude that the acts of forced labour were imposed with discriminatory intent.

203. The Appeals Chamber is therefore in no doubt that the eight detainees forced to work suffered persecution within the meaning of Article 5 of the Statute.

2. The Trial Chamber erred in holding that Krnojelac was not individually responsible under Article 7(1) of the Statute

204. In challenging the Trial Chamber's decision to acquit Krnojelac on count 1 of the Indictment the Prosecution also raises a second sub-ground in which it submits that the Trial Chamber erred in concluding that Krnojelac was not liable as a co-perpetrator in a joint criminal

[321] *Ibid*., para. 47 (footnotes omitted).

PURL: https://www.legal-tools.org/doc/46d2e5/

enterprise for the labour of the detainees who it had been established were forced to work. The Prosecution alternatively argues that if the Appeals Chamber were not to uphold the first sub-ground, Krnojelac should be held liable as an aider and abettor.[322]

205. The Appeals Chamber has already stated that, in this case, the alleged crime of forced labour should be dealt with as forming part of a first category joint criminal enterprise without reference to the system concept, and that the participants may be viewed as co-perpetrators of a joint criminal enterprise whose purpose was to commit the crimes in question or as aiders and abettors depending upon whether, as in the first instance, the individual concerned shared the common intent, or, as in the second, merely knew of it (see paras. 121 to 123 of this Judgement).

206. In this respect, the Appeals Chamber considers that Krnojelac must not be deemed a mere aider and abettor but a co-perpetrator of the crimes of forced labour. The Appeals Chamber holds that Krnojelac shared the intent to make the non-Serb detainees perform unlawful labour in conditions which it found to be such that it was impossible for them freely to consent to work. The Appeals Chamber finds that the only conclusion which a reasonable trier of fact should have reached was that Krnojelac was guilty as a co-perpetrator of persecution based on the forced labour of the non-Serb detainees for the following reasons: Krnojelac was aware of the initial decision to use KP Dom detainees to work[323] and was responsible for all the business units and work sites associated with the prison[324] and, as such, played a central role. Moreover, Krnojelac voluntarily accepted the position in full awareness that non-Serb civilians were being illegally detained at the KP Dom because of their ethnicity and he knew that none of the procedures in place for legally detained persons was ever followed at the KP Dom.[325] He exercised final control over the work of detainees in and for the KP Dom. He had regular meetings with the heads of the furniture factory, metal workshop and farm where detainees worked.[326]

207. In light of the foregoing, the Appeals Chamber believes that Krnojelac could not have failed to share the intent to use unlawfully detained non-Serb prisoners to work. The Appeals Chamber therefore finds that the Trial Chamber's decision to acquit Krnojelac of the crime of persecution based on forced labour must be reversed and that, pursuant to Article 7(1) of the Statute, Krnojelac must be convicted of persecution based on forced labour as a co-perpetrator of the joint criminal enterprise whose purpose was to persecute the non-Serb detainees by exploiting their forced labour.

[322] Prosecution Brief, paras. 7.85 to 7.94.
[323] Judgment, para. 364.
[324] *Ibid.*, para. 97.
[325] *Ibid.*, para. 100.
[326] *Ibid.*, para. 103.

PURL: https://www.legal-tools.org/doc/46d2e5/

G. The Prosecution's seventh ground of appeal: persecution by way of deportation and expulsion

208. The Prosecution puts forward five sub-grounds under this ground of appeal with regard to the Trial Chamber's findings on count 1 of the Indictment – persecution by way of "deportation and expulsion".[327]

1. Persecution by way of deportation and expulsion

209. The Prosecution claims that the Trial Chamber erred in finding that "the acts of forced displacement charged as persecution by way of deportation and expulsion under Article 5(h) of the Statute required proof that the victims were forcibly displaced across a national border."[328] The Prosecution adds that "deportation under Article 5 of the Statute includes not only unlawful displacements across a national boundary but also unlawful displacements within a State's national boundaries"[329] and that "the *Blaškić* Trial Judgement correctly defined deportation."[330] The Prosecution also claims that "incidents of forcible displacement were charged as persecution as a crime against humanity, and not as a breach of the legal provisions regulating international armed conflict."[331] The Prosecution further claims that the Trial Chamber was wrong to find that the term "expulsion"[332] also denotes crossing a national boundary.[333]

210. Under this sub-ground, the Prosecution relies mainly on the Trial Chamber's error in defining "deportation" and, to a certain extent, on its erroneous definition of "expulsion". The Appeals Chamber does not believe that the definition of these terms is the main issue. The subject of the submissions before the Trial Chamber was persecution and the Appeals Chamber holds that two questions arise from the Prosecution's conclusions: (a) did the Trial Chamber correctly

[327] Indictment, para. 5.2.
[328] Prosecution Brief, para. 8.1. The Appeals Chamber notes that the terms *deportation* and *expulsion* in English were translated in the French version of the Judgment as "déportation" and "expulsion" respectively (See, for example, Judgment, paras. 474 to 477). The Appeals Chamber points out that contrary to the French wording of Article 49 of the Fourth Geneva Convention which translates the English term *deportation* as "déportation", the French wording of Articles 2(g) and 5(d) of the Tribunal's Statute use the term "expulsion" as a translation of the term *deportation*. For reasons of convenience, the Appeals Chamber has decided to follow the French translation of the terms *deportation* and *expulsion* used both in the Indictment and the Judgment, namely "déportation" and "expulsion" respectively. It should nevertheless be pointed out that when it refers to the crime of *deportation* mentioned under Article 5 (d) of the English version of the Statute, the Appeals Chamber will depart from the above-mentioned convention and will use the term "expulsion" used in the French version of the Statute.
[329] Prosecution Brief, para. 8.3.
[330] *Ibid*.
[331] *Ibid.*, para. 8.7.
[332] As the term is used in the Judgment, para. 476.
[333] Prosecution Brief, para. 8.24.

PURL: https://www.legal-tools.org/doc/46d2e5/

interpret the allegations of persecution in the Indictment and (b) were the acts of displacement found by the Trial Chamber such that they could constitute crimes underlying persecution.

(a) The Prosecution's allegation of persecution

211. In the Indictment, Krnojelac is charged with persecution, punishable under Article 5(h) of the Statue, and with deportation and expulsion. He is not charged separately with "expulsion" (a crime against humanity).[334] The Prosecution alleges the following:

> As part of the persecution, MILORAD KRNOJELAC participated in or aided and abetted the execution of a common plan involving: […]
>
> f) the deportation and expulsion of Muslim and other non-Serb civilians detained in the KP Dom detention facility to Montenegro and other places which are unknown. […]
>
> In addition, MILORAD KRNOJELAC assisted in the deportation and expulsion of the majority of Muslim and non-Serb males from the Foča municipality by selecting detainees from the KP Dom for deportation or transfer to Montenegro and other unknown places. Several groups of detainees were transported to other detention facilities in Kalinovik, Rudo and Kula. In late August 1992, 35 elderly or ill detainees were deported by bus from the KP Dom to Rožaj in Montenegro. On that same day, Muslim detainees, previously selected with the 35 detainees to be deported to Montenegro, were taken for an alleged exchange in Goražde. These detainees have never been seen alive again. From June 1992 until March 1993, at least 266 Muslims and other non-Serbs detained in the KP Dom were deported and transferred to unknown places. These detainees have also never been seen alive again. The majority of these disappearances occurred from August 1992 to October 1992. The main reason the prison authorities gave for the removal of these missing detainees was to use them in prisoner exchanges.[335]

212. As stated above, the Prosecution alleged persecution in the following terms: "deportation and expulsion to Montenegro and other unknown destinations"; "were transported to other detention facilities in Kalinovnik, Rudo and Kula"; "35 elderly or ill detainees were transported by bus from the KP Dom to Rožaj in Montenegro [and] were taken for an alleged exchange in Goražde." The Appeals Chamber notes that the municipalities of Kalinovnik, Rudo, Kula and Goražde are in Bosnia and Herzegovina and that Rožaj municipality is in Montenegro. The Prosecution was obviously referring to displacement within Bosnia and Herzegovina as well as across its borders. It used the term "deportation" for alleged displacements outside of Bosnia and Herzegovina and the terms "transferred", "transported" or "taken away" for cases of displacement within Bosnia and Herzegovina. In the charges in the Indictment, these incidents were characterised as persecution by way of deportation and expulsion. A separate charge of expulsion does not appear in the Indictment. Moreover, the Appeals Chamber notes that in its Pre-Trial Brief, the Prosecution

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[334] Within the meaning of Article 5(d) of the Statute.
[335] Indictment, para. 5.2.

PURL: https://www.legal-tools.org/doc/46d2e5/

stated that the term "deportation" denoted displacements within a state as well as across a state's borders.[336] Furthermore, it did not define the term "expulsion".

213. The Trial Chamber found that "the majority of incidents alleged by the Prosecution to constitute deportation and expulsion did take place."[337] In other words, it found that most of the material facts underlying this part of the charge of persecution had been established. Applying these conclusions to the analysis of the crime of persecution, the Trial Chamber found that deportation "requires the displacement of persons across a national border, to be distinguished from forcible transfer which may take place within national boundaries."[338] The Trial Chamber noted that the Prosecution had made no effort "to define the act of expulsion or to differentiate it from the act of deportation" and that expulsion was not a technical term.[339] Moreover, the Trial Chamber stated that "[w]hile there is no clear definition of expulsion within the context of international criminal law, the concept does form part of the definition of deportation, which suggests that it requires displacement across national boundaries."[340] The Trial Chamber dismissed the allegation of persecution by providing a legal definition of deportation and expulsion as terms that only cover displacement across a national border and added that given that "[t]he Prosecution has not pleaded forcible transfers at all in the Indictment, […] the Trial Chamber cannot consider that offence as founding a charge of persecution."[341]

214. The Appeals Chamber holds that the Trial Chamber disregarded the fact that the crime alleged here was persecution by way of deportation and expulsion and not the separate crimes of expulsion or forcible transfer. The Appeals Chamber considers that, in this case, the Prosecution used the terms "deportation" and "expulsion" in the Indictment as general terms in order to cover acts of forcible displacement through which the Prosecution alleges the crime of persecution was committed.

215. The Appeals Chamber holds that although the wording in the Indictment was not the most appropriate, it did not, however, contain any ambiguity as to the fact that Krnojelac was being prosecuted for having committed the crime of persecution by way of forcible displacements both within and outside the borders of Bosnia and Herzegovina.

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[336] Pre-Trial Brief, para. 342 (footnotes omitted).
[337] Judgment, para. 477.
[338] *Ibid*., para. 474.
[339] *Ibid*., footnote 1437.
[340] *Ibid*., para. 476 (footnotes omitted).
[341] *Ibid*., para. 476.

PURL: https://www.legal-tools.org/doc/46d2e5/

216. The Appeals Chamber notes that in this case the Trial Chamber found that there had been cases of displacement across a national border as well as within Bosnia and Herzegovina, which included a "group of 35 men […] displaced across a national border to Montenegro"[342] and that the so-called exchanges took place on "15 or 19 August 1992 (15-20 men), summer of 1992, 22 August 1992 (8 men), 25 August 1992 (around 18-25 men), 31 August - 2 September 1992 (around 71 men), 10 September 1992 (between 10-40 men), 12 September 1992 (50 men), sometime between 11 and 16 December 1992 (7 men), February or March 1993 (Dr Aziz Torlak), and 21 March 1993 (Šućrija Softić)."[343] The Trial Chamber also established the displacement of "approximately twenty younger men [who were] taken away, possibly to Goražde."[344] The Appeals Chamber holds that the Trial Chamber was required to rule on the material facts alleged and to decide whether such acts constituted persecution under Article 5(h) of the Statute. By failing to do so, it committed an error of law. The Appeals Chamber will now examine whether this error invalidates the decision.

(b) Acts of displacement that can be characterised as persecution (a crime against humanity)

217. The Appeals Chamber will now examine which acts of displacement may constitute persecution when committed with the requisite discriminatory intent and whether the acts alleged by the Prosecution were such that they were acts constituting the crime of persecution. The Appeals Chamber holds that, in order to do this and contrary to what the Prosecution claims, it is not necessary to define deportation as "an umbrella term that covers acts of forcible displacement, whether internal or cross-border"[345] so as to consider whether these acts were such as to constitute the crime of persecution.

218. The Appeals Chamber holds that acts of forcible displacement underlying the crime of persecution punishable under Article 5(h) of the Statute are not limited to displacements across a national border. The prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference. The forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent.

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342 *Ibid*., para. 483.
343 *Ibid*., para. 480 (footnotes omitted).
344 *Ibid*., para. 482 (footnotes omitted).
345 Prosecution Brief, para. 8.7.

PURL: https://www.legal-tools.org/doc/46d2e5/

219. The Appeals Chamber holds that the crime of persecution may take different forms. It may be one of the other acts constituting a crime under Article 5 of the Statute[346] or one of the acts constituting a crime under other articles of the Statute.[347]

220. However, a conviction can only be based on an offence that existed at the time the acts or omissions with which the accused is charged were committed and which was sufficiently foreseeable and accessible.[348] It is therefore necessary to investigate which acts of displacement are considered crimes under customary international law. The Geneva Conventions are considered to be the expression of customary international law.[349] Article 49 of the Fourth Geneva Convention prohibits displacement to another state, within or from occupied territory. It provides that: "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."[350] Moreover, Article 85 of Additional Protocol I prohibits "the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or part of the population of the occupied territory within or outside this territory in violation of Article 49 of the Fourth Convention."[351] Furthermore, Article 17 of Additional Protocol II to the Geneva Conventions explicitly prohibits the forced displacement of the population within or outside a country in which an internal armed conflict has broken out. It reads as follows:

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[346] *Kupreškić* Judgement, paras. 608 to 615; see also *Krstić* Judgement, para. 535, and *Kordić* Judgement, paras. 197 and 198.
[347] *Kordić* Judgement, para. 193; *Krstić* Judgement, para. 535.
[348] *Ojdanić* Decision, paras. 37 to 39.
[349] *Čelebići* Appeals Judgement, para. 113; *Tadić* Decision (Motion on Jurisdiction), paras. 79 to 85. In paragraph 35 of his report, the Secretary-General declared that: "The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict embodied in: the Geneva Conventions of 12 August 1949."
[350] Article 49 of the Fourth Geneva Convention provides that: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased. The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated."
[351] Article 85 of Additional Protocol I provides that "[i]n addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed willfully and in violation of the Conventions of the Protocol: (a) The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention." The Commentary on the Additional Protocols states that "[t]he part of the sub-paragraph dealing with the transfer or deportation of the population of the occupied territory is merely a repetition of Article 147 of the Fourth Convention, and Article 49 of that Convention, to which reference is made, continues to apply unchanged. Thus the new element in

PURL: https://www.legal-tools.org/doc/46d2e5/

> Article 17 - Prohibition of forced movement of civilians - 1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. 2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.[352]

Article 17 of Additional Protocol II uses the term "forced movement" to describe displacements within and across borders during an internal armed conflict. However, the Commentary to this Protocol states that the term "forced movement" also covers "deportation measures obliging an individual to leave his country".[353] The Geneva Conventions and their Additional Protocols prohibit forced movement within the context of both internal and international armed conflicts. This is relevant when determining the gravity of the acts in question, which is what the Appeals Chamber will now consider.

221. For these acts to be considered acts constituting the crime of persecution, they must have been committed, separately or cumulatively, with discriminatory intent and must constitute a crime of persecution the gravity of which is equal to the other crimes listed in Article 5 of the Statute. On several occasions, the Tribunal's Trial Chambers have found that the forced displacement of the population within a state or across its borders constituted persecution.[354] The Secretary-General's report, which was approved by the Security Council,[355] states that "[c]rimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character."[356] It further states that "[c]rimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape" and that "[i]n the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called 'ethnic cleansing' and widespread and systematic rape."[357] The Security Council

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this sub-paragraph concerns the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies." (See Commentary to the Additional Protocols, p. 1000).

[352] The Commentary to Additional Protocol II states that paragraph 2 refers to forced movements across national borders and asks the following question with regard to this paragraph: "What is the position as regards deportation measures obliging an individual to leave his country? If such a measure arises from the situation of conflict, it constitutes forced movement within the meaning of this article […]", paras. 4863 and 4864.

[353] Commentary to Additional Protocols, paras. 4863 and 4864.

[354] *Blaškić* Judgement, in which acts of displacement within Bosnia and Herzegovina within the context of an armed international conflict were described as forcible transfer which constituted persecution, paras. 75 to 130, 234, 366, 380, 575 and 631. In the *Naletilić* and *Martinović* Judgement, the Trial Chamber found that there had been forcible transfer pursuant to Article 2(g) of the Statute in the case of displacements within Bosnia and Herzegovina and concluded that the same acts constituted persecution by way of forcible transfer and not by way of deportation, paras. 512 to 571 and 669 to 672. See also *Plavšić* Sentencing Judgement, paras. 31 to 40, and *Krstić* Judgement, paras. 537 to 538. In paragraph 629 of the *Kupreškić* Judgement, the Trial Chamber stated that "the organised detention and expulsion from Ahmići can constitute persecution."

[355] Resolution 827 (1993).

[356] Secretary-General's Report, para. 47.

[357] *Ibid*., para. 48.

PURL: https://www.legal-tools.org/doc/46d2e5/

was therefore particularly concerned about acts of ethnic cleansing and wished to confer jurisdiction on the Tribunal to judge such crimes, regardless of whether they had been committed in an internal or an international armed conflict. Forcible displacements, taken separately or cumulatively, can constitute a crime of persecution of equal gravity to other crimes listed in Article 5 of the Statute. This analysis is also supported by recent state practice, as reflected in the Rome Statute, which provides that displacements both within a state and across national borders can constitute a crime against humanity and a war crime.[358]

222. The Appeals Chamber concludes that displacements within a state or across a national border, for reasons not permitted under international law, are crimes punishable under customary international law, and these acts, if committed with the requisite discriminatory intent, constitute the crime of persecution under Article 5(h) of the Statute. The Appeals Chamber finds that the facts accepted by the Trial Chamber fall within the category of displacements which can constitute persecution.

223. For the reasons set out above, the Appeals Chamber holds that at the time of the conflict in the former Yugoslavia, displacements both within a state and across a national border were crimes under customary international law. Consequently, the principle *nullum crimen sine lege* has been respected.[359]

224. The Appeals Chamber finds that by failing to establish whether the alleged acts of forcible displacement constituted persecution, the Trial Chamber committed an error of law which invalidates its decision. In view of the foregoing, the Appeals Chamber considers that it is not necessary to express a view either supporting or rejecting the Trial Chamber's definition of the terms "deportation" and "expulsion". The issue here was to determine whether the alleged acts of forcible displacement - provided that they were committed with discriminatory intent - could constitute the crime of persecution. The Appeals Chamber notes that the terms "deportation" and "expulsion" in paragraph 5.2(f) of the Indictment were clearly used by the Prosecution as generic

[358] The *Tadić* Appeals Judgement states that the Statute "was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee of the United Nations General Assembly. This shows that that text is supported by a great number of States and may be taken to express the legal position i.e. *opinio iuris* of those States", para. 223. "Deportation or forcible transfer of population" is punishable under Article 7(1)(d) of the Rome Statue. Paragraph 2 states that: "Deportation or forcible transfer of population means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law." Article 8(2)(a)(vii) of the Rome Statute also provides that unlawful deportation and transfer constitute war crimes.

[359] Paragraph 37 of the *Ojdanić* Decision states that: "The principle *nullum crimen sine lege* is, as noted by the International Military Tribunal in Nuremberg, first and foremost a principle of justice. It follows from this principle that a criminal conviction can only be based on a norm which existed at the time the acts or omission with which the accused is being charged were committed." (footnotes omitted).

PURL: https://www.legal-tools.org/doc/46d2e5/

terms covering all the acts alleged here as acts constituting the crime of persecution. No reference was made in the Indictment to Article 5(d) of the Statute which covers deportation. It is thus not necessary to define a term which does not appear in the provision upon which the Indictment is based.

225. Given the other arguments relied upon in support of this ground of appeal, the Appeals Chamber will determine whether the facts that have been established constitute persecution entailing Krnojelac's criminal responsibility.

2. Exercise of genuine choice

226. The Prosecution claims that the Trial Chamber erred in fact in finding that the 35 non-Serb KP Dom detainees who were taken across the border to Montenegro freely chose to be exchanged.[360] The Prosecution claims that the Trial Chamber was wrong not to take into account the coercive environment in which the detainees in the KP Dom were held. By analogy with the examination conducted in the *Kunarac* Appeals Judgement of the issue of rape and sexual violence, the Prosecution claims that living conditions in the KP Dom were such that genuine consent was impossible, and the prisoners were not given any choice as to their destination.[361] The Defence responded that for reasons beyond the Accused's control, the Muslim inhabitants of Foča had already abandoned the town, and it was therefore reasonable for them to chose to go to Montenegro.[362]

227. The Trial Chamber concluded that "this group of 35 men was displaced across a national border to Montenegro. However, there is general evidence that the detainees wanted to be exchanged, and that those selected for so-called exchanges freely exercised their choice to go and did not have to be forced. The Trial Chamber is not satisfied that the displacement of these individuals from Foča necessarily involved in the choice they made was involuntary."[363] The Trial Chamber divided the acts alleged in the Indictment as expulsion and deportation into three types: "transfer of detainees to other prison camps, so-called exchanges and so-called work duty".[364] It

[360] Prosecution Brief, paras. 8.24 to 8.30.
[361] *Ibid*., paras. 8.31 to 8.42.
[362] Defence Response, paras. 225 to 227.
[363] Judgment, para. 483 (footnotes omitted).
[364] *Ibid*., para. 477. In the English version of the Judgment, which is authoritative, the paragraph *in fine* reads as follows: "These incidents may be divided into three types: transfer of detainees to other prison camps, so-called exchanges and so-called work duty." In the French version, the paragraph in question reads as follows *in fine*: "Ces faits peuvent être répartis en trois catégories : le transfert de détenus vers d'autres camps de détention, les échanges et les réquisitions." The Appeals Chamber freely modified the paragraph by following the English version of the Judgment.

PURL: https://www.legal-tools.org/doc/46d2e5/

found that the case of the 35 prisoners was one of “so-called exchanges”.[365] In reaching this finding, the Trial Chamber relied on the testimony of six witnesses which will be considered below.

228. In the part of his testimony upon which the Trial Chamber relied, witness FWS-54 stated:

> Q. Were detainees taken out for exchanges while you were there, before you were taken, actually?
>
> A. They were taken out. All were taken out, in fact, under the pretext of being taken away for exchanges. Perhaps they never got there. Nobody was ever told that they were being taken out to be liquidated. Everybody was taken out – I mean, these people would look very happy, they would be pleased to be going to be exchanged, but…[366]

The Trial Chamber also relied on the statements of the following witnesses. Witness FWS-65 stated:

> A. Then, following the inmates’ list and knowing – and since that policeman knew which inmates were in what room, they would unlock the room and would call out the inmates in that particular room. And he would say, “Get your affairs ready; you are off to be exchanged,” on such occasions.
>
> Q. When this would happen, did you want to be exchanged?
>
> A. Well, it happened sometime during the day. And after two or three such exchanges, I, since I had a heart condition, I would always be excited, I would always get impatient. Oh, if only I could get out, if only I could get out. Considering that if the policeman said “You are off to be exchanged,” then to me it meant release, release from the camp, and a crossing over, possibly, meeting – uniting with my family.[367]

Witness FWS-249:

> Q. What happened to them? Were they also taken away in a so-called exchange, or what?
>
> A. They were all taken for an exchange. We were actually looking forward to those exchanges, thinking that one day our turn would come. However, there were very few actual exchanges, real exchanges. In most cases, they were fatal.[368]

Witness FWS-109:

> Q. Did you ever try to actually get exchanged yourself? Because you said you were actually looking forward to this. Did you try to get exchanged?
>
> A. I tried, I begged. I also wrote a written application […] [369]

Witness Rasim Taranin:

> A. I mean all those groups that went out. They said that they were all going out for an exchange, and we were all pleased, and we all tried to get into these groups, to get into those exchanges. And

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[365] *Ibid*., para. 483. The translation problem in paragraph 477 reappears in paragraph 483 of the Judgment.
[366] T, p. 774.
[367] T, p. 523.
[368] T, p. 4483.
[369] T, p. 2399.

PURL: https://www.legal-tools.org/doc/46d2e5/

> when I got out, my phone wouldn't stop ringing. People kept asking me where these people were. There were women calling me and asking about their husbands and other people, and everybody was asking. The only thing I could say was, "He went out for an exchange," and see, they're missing until the present day. [370]

Witness RJ:

> Q. When people were called out, did you know what happened to them, whether they were exchanged or disappeared? Did you have access to that information?
>
> A. I never had access to such information nor did anyone know what happened to people who would leave the KP Dom. We were as happy as children when the policemen would come with lists. They would say such-and-such is going, such-and-such a person is going, etc. There would be joy all over. However, what happened then, what happened after the gate, I really don't know.[371]

229. The Trial Chamber held that "there was general evidence" that the detainees wanted to be exchanged. The Appeals Chamber examined the testimony on which the Trial Chamber relied[372] and found that they were of a general nature and did not specifically refer to the 35 detainees in question. This testimony shows that the prisoners were happy about the exchanges, which gave them hope and made them keenly wish to be liberated, and that some of the detainees even went so far as to ask to be exchanged. However, the Appeals Chamber holds that this does not necessarily imply that it was a matter of "genuine choice". Yet it is the absence of genuine choice that makes displacement unlawful. Similarly, it is impossible to infer genuine choice from the fact that consent was expressed, given that the circumstances may deprive the consent of any value.[373] Consequently, when analyzing the evidence concerning these general expressions of consent, it is necessary to put it into context and to take into account the situation and atmosphere that prevailed in the KP Dom, the illegal detention, the threats, the use of force and other forms of coercion, the fear of violence and the detainees' vulnerability. Yet the Trial Chamber was content to consider the testimony in isolation.

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[370] T, pp. 1725 and 1726.
[371] T, p. 3868.
[372] Witnesses FWS-54, T, p. 774; FWS-65, T, p. 523; Rasim Taranin, T, p.1725; FWS-109, T, p. 2399; FWS-249, T, p. 4483; RJ, T, p. 3868.
[373] In the Final Record of the Diplomatic Conference of Geneva 1949, convened by the Swiss Federal Council for the Establishment of International Conventions for the Protection of War Victims, volume II, section A, held at Geneva from 21 April to 12 August 1949, it is stated that the words "against their will" which occurred in the previous draft (the so-called Stockholm text) were omitted as the Drafting Committee considered that they were valueless in view of the pressure that could be brought to bear on internees, p. 759. The Commentary to the Fourth Geneva Convention states that "the Diplomatic Conference preferred not to place an absolute prohibition on transfers of all kinds, as some might up to a certain point have the consent of those being transferred. The Conference had particularly in mind the case of protected persons belonging to ethic or political minorities who might have suffered discrimination or persecution on that account and might therefore wish to leave the country. In order to make due allowances for that legitimate desire the Conference decided to authorise voluntary transfers by implication, and only to prohibit 'forcible' transfers", Commentary to the Fourth Geneva Convention, p. 279.

PURL: https://www.legal-tools.org/doc/46d2e5/

230. However, the Trial Chamber also found in its Judgment that "[m]any of the detainees were subjected to beatings and other forms of mistreatment"[374] and that the persons detained in the KP Dom were unlawfully detained.[375]

231. The testimony of FWS-54, one of the 35 detainees, illustrates the atmosphere of fear and constraint that prevailed in the KP Dom. The Trial Chamber noted that on 8 August 1992, about 20 days before being moved, "FWS-54 was beaten by a KP Dom guard named Pilica Blagojević as punishment for giving a fellow detainee an extra slice of bread contrary to orders. As a result of the beating, FWS-54 was seriously bruised and lost a few teeth. After the beating, he was locked up in solitary confinement for three or four days."[376] Furthermore, relying on the testimony of FWS-54, the Trial Chamber found that on five occasions in June or July 1992, detainees were called outside and were severely beaten. Other detainees heard the cries and moans of the victims.[377]

232. None of the detainees returned.[378] Witness FWS-54 heard the sound of the beating dying down, and then heard gunshots being fired and a vehicle leaving.[379] The Trial Chamber considers that this episode must have increased FWS-54's fear.

233. The Trial Chamber finds that living conditions in the KP Dom made the non-Serb detainees subject to a coercive prison regime which was such that they were not in a position to exercise genuine choice. This leads the Appeals Chamber to conclude that the 35 detainees were under duress and that the Trial Chamber erred in finding that they had freely chosen to be exchanged.

3. Discriminatory nature of the displacements

234. The Prosecution claims that no Trial Chamber could reasonably have held that there was no evidence that the displacement of the 35 detainees to Montenegro had been committed on the requisite discriminatory ground.[380] The Prosecution refers generally to its submissions in support of its fifth ground of appeal[381] and, in particular, to the systematically abusive and discriminatory environment in which the KP Dom detainees lived as a result of their ethnicity.[382]

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[374] Judgment, para. 46.
[375] Judgment, para. 124.
[376] Judgment, para. 219, footnotes omitted.
[377] *Ibid*., para. 274.
[378] *Ibid*., para. 274.
[379] *Ibid*., para. 274.
[380] Prosecution Brief, para. 8.43.
[381] See paragraph 181 and the following paragraphs of this Judgement.
[382] Prosecution Brief, para. 8.43.

PURL: https://www.legal-tools.org/doc/46d2e5/

235. The Trial Chamber stated that "there is no direct evidence showing that the displacement was committed on one of the listed discriminatory grounds."[383] The Appeals Chamber notes that the discriminatory intent of forced displacements cannot be directly inferred from the general discriminatory nature of an attack described as a crime against humanity.[384] However, the Appeals Chamber considers that, given the facts of the case, there are circumstances surrounding the commission of the acts charged that make it possible to infer that there was such an intent.

236. The Trial Chamber reached the following conclusion:

> The expulsion, exchange or deportation of non-Serbs, both detainees at the KP Dom and those who had not been detained, was the final stage of the Serb attack upon the non-Serb civilian population in Foča municipality. Initially there was a military order preventing citizens from leaving Foča. However, most of the non-Serb civilian population was eventually forced to leave Foča. In May 1992, buses were organized to take civilians out of town, and around 13 August 1992 the remaining Muslims in Foča, mostly women and children, were taken away to Rožaje, Montenegro. On 23 October 1992, a group of women and children from the municipality, having been detained for a month at Partizan Sports Hall, were deported by bus to Goražde. […] In late 1994, the last remaining Muslim detainees at the KP Dom were exchanged, marking the end of the attack upon those civilians and the achievement of a Serbian region ethically cleansed of Muslims. By the end of the war in 1995, Foča had become an almost purely Serb town.[385]

237. Given these conclusions, as well as the discriminatory character of unlawful detention and the imposition of the living conditions[386] described above on non-Serb KP Dom detainees, the Appeals Chamber considers that it was not reasonable for the Trial Chamber to conclude that there was no evidence that the 35 detainees had been transferred to Montenegro on the requisite discriminatory grounds.

238. The Appeals Chamber holds that the reasoning with regard to the forcible displacement of the 35 non-Serb detainees to Montenegro is applicable *mutatis mutandis* to other displacements recognised by the Trial Chamber. The same holds for Krnojelac's discriminatory intent.

4. Krnojelac's responsibility

239. In its fourth sub-ground, the Prosecution submits that the Trial Chamber erred in not holding Krnojelac responsible for the displacement of detainees within Bosnia and Herzegovina, with which he was charged under count 1 (persecution), and that the acquittal should be reversed. Furthermore, in its fifth sub-ground, the Prosecution claims that the Trial Chamber erred in failing to find Krnojelac criminally responsible, under Article 7(1) of the Statute, for the transfer of 35 non-Serb

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[383] Judgment, para. 483 (footnotes omitted).
[384] See para. 184 of this Judgement.
[385] Judgment, para. 49 (the Trial Chamber uses the term "deportation" here to mean displacement within the borders of Bosnia and Herzegovina).
[386] See, for example, paragraph 193 of this Judgement.

PURL: https://www.legal-tools.org/doc/46d2e5/

detainees to Montenegro and of other non-Serb detainees to other locations in Bosnia and Herzegovina.[387]

240. The Appeals Chamber will examine both sub-grounds jointly. The Defence claims that Krnojelac had no control over the displacements and that the list of persons exchanged was compiled by the military authorities.[388] The Prosecution argues that given that Krnojelac was aware of the existence of a system for displacing and exchanging KP Dom detainees, he is liable as a co-perpetrator in a joint criminal enterprise.[389] Alternatively, the Prosecution claims that Krnojelac is liable as an aider and abettor since he knew that detainees were forcibly removed on discriminatory grounds.[390]

241. The Appeals Chamber is convinced, beyond all reasonable doubt, that Krnojelac is liable as a co-perpetrator in a joint criminal enterprise whose objective was to persecute the KP Dom detainees by deporting and expelling them.

242. The Appeals Chamber notes that the Accused was not charged with the alleged deportations and expulsions as a participant in the second category of a joint criminal enterprise (based on the concept of a system), but as a participant in the first category of such an enterprise, which requires Krnojelac to have shared the intent of the principal perpetrator. However, Krnojelac is liable for having participated in a joint criminal enterprise whose common objective, which he shared, was to exchange non-Serb KP Dom prisoners. It is therefore not necessary to prove that he personally participated in compiling the lists of the exchanged non-Serbs prisoners. Krnojelac's responsibility will therefore be examined in relation to the first category of joint criminal enterprise. Some of the participants in this joint criminal enterprise worked in the KP Dom, whereas others, such as the military authorities, were outsiders.

243. In the Judgment, it was noted that:

> The Trial Chamber is satisfied that detainees were taken out of the KP Dom on exchanges during the period relevant to the Indictment. These exchanges generally followed a similar pattern. A KP Dom guard or policeman would come from the gate to the detainees' rooms to call out the detainees for exchanges according to a list provided by the prison administration. Those selected would then be taken out of the KP Dom. On some occasions they would be beaten first, by KP Dom guards or military personnel. While some of those exchanges were "*bona-fide*",[391] allowing detainees to reach territory controlled by Bosnian Muslims, many detainees taken out for exchange simply disappeared. Witnesses confirmed the fact that the 'exchanged' detainees had disappeared after they were themselves released or exchanged, either through contact with the families of those

[387] Prosecution Brief, para. 8.48.
[388] Defence Response, para. 230.
[389] Prosecution Brief, para. 8.50.
[390] *Ibid*.
[391] Quotation marks and italics added.

PURL: https://www.legal-tools.org/doc/46d2e5/

that had disappeared, through other former detainees years later, or through attempts to get information from the ICRC about relatives.[392]

244. In its Brief, the Prosecution does not dispute the Defence's claim that it was primarily the army that made decisions about "exchanges".[393] The Prosecution, referring to its Pre-Trial Brief, claims that it was the KP Dom administration under the authority of Krnojelac that "executed the decision" of the military authorities.[394] The Prosecution claims in its Brief that "a guard inside the prisoners' compound [got] a piece of paper from a guard at the gate of the administrative building. The guard inside the prisoners' quarters would then go into the room to call out the detainees for alleged exchanges."[395]

245. The Appeals Chamber is satisfied that the KP Dom administration executed the orders of the military authorities and that the KP Dom guards turned over detainees for transfer. However, it is not satisfied that Krnojelac was able to influence the selection of detainees who were to be displaced. There is evidence that Krnojelac tried, without success, to assist witness RJ who wanted to be exchanged and that he believed he was assisting him to gain security and rejoin his family.[396] Moreover, the Prosecution claims that Krnojelac "knew that the transport of detainees was problematic and that he had reason to ensure the safety of the detainees after they left the compound."[397] The Appeals Chamber holds that Krnojelac did know the consequences of the transport of detainees but did not play a role in it.

246. However, Krnojelac bears individual criminal responsibility for the exchanges which were part of the joint criminal enterprise in which he personally played a role with the ultimate aim of forcibly displacing the detainees under his control in the KP Dom. Even if he did not have control over a specific stage of the operation, he accepted the final result of the enterprise. It is thus not necessary to prove that he personally participated in compiling the lists. The "exchanges" started during the summer of 1992 and continued at least until March 1993.[398] As stated above, the Appeals Chamber is satisfied that non-Serb detainees were taken from the KP Dom with discriminatory intent. According to his own testimony, Krnojelac knew that the detainees were being removed from the KP Dom.[399] Furthermore, the Trial Chamber established that, by virtue of his position as

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[392] Judgment, para. 479.
[393] Prosecution Reply, para. 8.15.
[394] Prosecution Brief, para. 8.52.
[395] Pre-Trial Brief, para. 193, referring to the testimony of Safet Avdić, T, p. 522; FWS-215, T, p. 899; Ahmet Hadžimusić, T, p. 1970, FWS-159, T, pp. 2472 and 2473; FWS-146, T, p. 3078; Ekrem Zeković, T, p. 3490; RJ, T, p. 3899; FWS-69, T, pp. 4095 and 4121; FWS-172, T, p. 4574; FWS-137, T, pp. 4746 and 4750.
[396] RJ, T, pp. 3848 and 3849; Krnojelac, T, pp. 7030 to 7032.
[397] Prosecution Brief, para. 8.52.
[398] Judgment, paras. 477 to 485.
[399] Krnojelac, T, p. 7930.

PURL: https://www.legal-tools.org/doc/46d2e5/

prison warden, Krnojelac knew that non-Serb detainees were unlawfully detained as a result of their ethnicity.[400] As warden, Krnojelac authorised the KP Dom personnel to turn over non-Serb detainees. He supported such removals by allowing them to continue. Without illegal imprisonment, it would not have been possible to continue carrying out exchanges. The Appeals Chamber is satisfied that Krnojelac shared the intent of the principal perpetrators in the joint criminal enterprise aimed at removing the non-Serb detainees from the KP Dom.

247. The Appeals Chamber finds that Krnojelac is responsible, as a co-perpetrator, of persecution by way of forcible displacement which, as the Prosecution alleges, took the form of "deportation" and "expulsion".

248. This ground of appeal is therefore upheld.

[400] Judgment, para.100.

PURL: https://www.legal-tools.org/doc/46d2e5/

V. SENTENCE

249. In the present case, both parties raised grounds of appeal relating to the seven-and-a-half-year sentence imposed by the Trial Chamber.[401] The Appeals Chamber has examined these various grounds of appeal by applying the standard of review for alleged errors established in its case-law.[402] It will however first briefly summarise the grounds of appeal.

250. The Defence essentially argues that the Trial Chamber misdirected itself as to the weight to attach to the aggravating and mitigating circumstances. The Appeals Chamber dismisses this Defence ground of appeal principally for the following reasons.

251. The Defence submits that, in sentencing Krnojelac, the Trial Chamber did not give serious consideration to his individual circumstances, namely his advanced age, his four sons and nine grand-children, and the fact that two of his sons are disabled ex-servicemen, that he has worked in the poorly paid teaching profession all his life and that his harmonious marriage to a Croat has lasted over 40 years.[403] The Appeals Chamber considers that, in this instance, there is no evidence to suggest that the Trial Chamber failed to attach sufficient weight to the factors referred to by the Defence. In any event, the Defence did not show that the Trial Chamber had failed to do so. Furthermore, it should be noted that, in its analysis, the Trial Chamber took into consideration two factors mentioned expressly by the Defence, namely, Krnojelac's teaching career and his age. Indeed, the Trial Chamber stated that it had taken into account the fact "that, prior to his appointment as warden at the KP Dom, the Accused was a person of good character and that, since the termination of his appointment as warden of the KP Dom, the Accused [had] returned to his teaching profession without any suggestion of further criminal conduct on his part."[404] As for age, the Trial Chamber pointed out that, in sentencing, it had noted: "the fact that the Accused, Milorad Krnojelac, is now 62 years of age."

[401] See the summary of the grounds of appeal in the introduction to this Judgement.
[402] "[A]s a general rule, the Appeals Chamber will not substitute its sentence for that of a Trial Chamber unless 'it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law.' The Appeals Chamber will only intervene if it finds that the error was 'discernible'. As long as a Trial Chamber does not venture outside its "discretionary framework" in imposing sentence, the Appeals Chamber will not intervene. It therefore falls on each appellant […] to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing the sentence it did." See *Čelebići* Appeals Judgement, para. 725 (footnotes omitted).
[403] Defence Brief, paras. 212 to 216.
[404] Judgment, para. 519.

PURL: https://www.legal-tools.org/doc/46d2e5/

252. The Defence further contends that the Trial Chamber analysed the gravity of the crimes committed incorrectly. The Appeals Chamber dismisses all of Krnojelac's main submissions summarised below.

253. First, the Defence states that in determining the sentence to be imposed upon an accused whose criminal responsibility is based upon the acts of others - because the accused has been convicted as an aider and abettor or a superior - the gravity of his criminal misconduct must be evaluated independently of that of the crimes' perpetrators.[405] Bearing in mind the relevant case-law,[406] the Appeals Chamber sees no discernible error on the part of the Trial Chamber.

254. Secondly, the Defence contends that the Trial Chamber did not properly evaluate the gravity of the crimes in that it attached too little weight to Krnojelac's lack of experience as a prison warden and to his character – that is to say, to the fact that he disliked confronting authorities. The Appeals Chamber considers that there is no evidence to support the assertion that the Trial Chamber erred by failing to take Krnojelac's lack of experience and character into account as mitigating circumstances. The Appeals Chamber finds that the Defence failed to show that, in assessing the gravity of his conduct as an aider and abettor to the acts of others, the Trial Chamber erred by not considering those as mitigating factors but, instead, as grounds for placing less weight on the aggravating feature of his position as warden than it otherwise would have.[407]

255. Thirdly, the Defence states that the Trial Chamber did not attach the proper weight to the attitude of the witnesses and Muslim detainees towards Krnojelac and that the gravity of his misconduct was best conveyed by the testimony of witnesses such as FWS-144 and defence witness A. The Defence likewise submits that the Trial Chamber placed insufficient weight upon his attempts to improve the living conditions of the detainees.[408] Here again, there is no evidence that the Trial Chamber failed to use its discretion properly in sentencing Krnojelac in considering his attempts to improve the detainees' living conditions. The Appeals Chamber holds that the Trial Chamber was entitled to find that Krnojelac's attitude towards non-Serb detainees could not

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[405] Defence Brief, para. 218.
[406] The Appeals Chamber reiterates the finding it made in the *Čelebići* Appeals Judgement, that is: when imposing a sentence upon a superior whose criminal responsibility is based upon the crimes committed by his subordinates, "[a]s a practical matter, the seriousness of a superior's conduct in failing to prevent or punish crimes must be measured to some degree by the nature of the crimes to which this failure relates." (*Čelebići* Appeals Judgement, para. 259).Furthermore, "a consideration of the gravity of offences committed under Article 7(3) of the Statute involves, in addition to a consideration of the gravity of the conduct of the superior, a consideration of the seriousness of the underlying crimes." (*Ibid.*, para. 263).
[407] Judgment, para. 516.
[408] Defence Brief, paras. 224 to 228.

PURL: https://www.legal-tools.org/doc/46d2e5/

constitute significant mitigating circumstances, bearing in mind its overall assessment of the gravity of Krnojelac's criminal conduct as KP Dom warden over the course of 15 months.

256. Fourthly, the Defence argues that the Trial Chamber failed to take into account that the KP Dom was leased to the military, which limited Krnojelac's authority within the KP Dom and brought about a change in the operation of the facility. It also contends that he did not have the "strongly distinctive authority that would allow him to encourage the chief perpetrators to commit their acts".[409] The Appeals Chamber takes the view that the Trial Chamber was entitled to find that Krnojelac's pre-eminent position within the prison aggravated, at the very least, the aiding and abetting of cruel treatment and persecution of which he was guilty with respect to the detainees. The Defence did not show how the Trial Chamber abused its discretion.

257. Fifthly, the Defence maintains that the Trial Chamber erred in stating that Krnojelac "expressed no regret for the part he played in the commission of these offences, and only insubstantial regret that the offences had taken place."[410] The Appeals Chamber observes that there is no evidence that the Trial Chamber regarded the lack of any regret as an aggravating circumstance and increased the sentence accordingly. The Appeals Chamber finds that, in noting that Krnojelac felt no remorse, the Trial Chamber did nothing more than indicate that he could not benefit from the mitigating circumstance of an accused's expression of remorse. As for the Defence's assertion that he expressed regret for the acts committed by those who mistreated the detainees, the Appeals Chamber considers that the Trial Chamber simply pointed out that Krnojelac's insubstantial regret could not be taken into account as significant mitigation.

258. Turning to the Prosecution, it essentially submits that the Trial Chamber erred both in imposing a sentence which reflected neither the gravity of the offences nor the degree of Krnojelac's culpability and in mistakenly taking certain factors into account.[411] It asks that the Appeals Chamber revise the sentence upwards.[412] The Appeals Chamber dismisses all the Prosecution's allegations. It has, however, identified two errors made by the Trial Chamber. The first of these errors does not require the Appeals Chamber to intervene. However, the second will be taken into consideration when the Appeals Chamber determines the sentence to be imposed in view of the new convictions.

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[409] Defence Brief, paras. 229 and 230.
[410] *Ibid*., para. 513.
[411] Prosecution Brief, para. 9.1.
[412] Prosecution Brief, para. 9.26.

PURL: https://www.legal-tools.org/doc/46d2e5/

259. First, the Prosecution challenges the finding in paragraph 512 of the Judgment, namely: that the effects of a crime upon the relatives of the immediate victims are irrelevant to the culpability of the offender or the sentence.[413] In paragraph 512 of the Judgment, the Trial Chamber stated as follows:

> The Prosecution has submitted that what it calls an "*in personam* evaluation" of the gravity of the crime could or should also concern the effect of that crime on relatives of the immediate victims. The Trial Chamber considers that such effects are irrelevant to the culpability of the offender, and that it would be unfair to consider such effects in determining a sentence. Consideration of the consequences of a crime upon the victim who is directly injured by it is, however, always relevant to the sentencing of the offender. Where such consequences are part of the definition of the offence, they may not be considered as an aggravating circumstance in imposing sentence, but the extent of the long-term physical, psychological and emotional suffering of the immediate victims is relevant to the gravity of the offences.[414]

260. The Appeals Chamber states that the distinction between reparation and punishment is well known. Without crossing the dividing line that separates these two concepts,[415] the case-law of some domestic courts shows that a trial chamber may still take into account the impact of a crime on a victim's relatives when determining the appropriate punishment. The Appeals Chamber considers that, even where no blood relationships have been established, a trier of fact would be right to presume that the accused knew that his victim did not live cut off from the world but had established bonds with others. In this instance, no consideration was given to the effect of the crimes on these people. However, the Appeals Chamber believes that the fact that the Trial Chamber did not take this into account had no major impact on the sentence and that there is, therefore, no reason for changing it. The Prosecution did not provide the Appeals Chamber with sufficient evidence to enable it to assess the actual consequences of the crimes on the victims' relatives.

261. Secondly, the Prosecution challenges the weight which the Trial Chamber allowed in mitigation of sentence to the co-operation provided to the Tribunal and Prosecution by the Defence – and not by Krnojelac.[416] The Prosecution argues that the efficient and co-operative conduct of *defence counsel* cannot be a mitigating factor warranting a reduced sentence for the *accused* any more than the inefficient or unco-operative conduct of counsel may be considered an aggravating

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[413] Prosecution Brief, paras. 9.7 to 9.13; T(A), 14 May 2003, pp. 135 and 136.
[414] Footnotes omitted.
[415] See, for example, in the United States, *Payne v. Tennessee*, 111 S. Ct. 2597, 2615-2616 (1991); 18 U.S.C. § 3593. See also, in the United Kingdom, *R. v. Cooksley* [2003] 2 Cr. App. R. 18; *R. v. Delaney*, 2003 WL 033375 (CA (Crim. Div.)); *R. v. McSween*, 2002 WL 31452147 (CA (Crim. Div.)); *R. v. Kelly & Donelly*, [2001] 2 Cr. App. R. (S.) 73. See also, in Canada, *R. v. Jack*, 2001 Yuk. S. Ct., 542; *R. v. Duffus*, 40 C.R. (5th) 350 (Ont. Sup. Ct. 2000); *R. v. Emard* [1999] B.C.J. no. 463 (British Columbia Supreme Court). See also, in Australia, *R. v. Heblos*, [2000] VSCA 229; *R. v. Willis*, [2000] VSC 297; *R. v. Birmingham*, 96 A. Crim. R. 545 (S. Ct. S.A. 1997); *Mitchell v. R.*, 104 A. Crim. R. 523 (Crim. App. W.A. 1998); *R. v. P.*, 39 FCR 276 (1992); *cf. R. v. Previtera*, 94, A. Crim. R. 76 (S. Ct. N.S.W. 1997).
[416] Prosecution Brief, para. 9.14.

PURL: https://www.legal-tools.org/doc/46d2e5/

factor warranting an increased sentence.[417] In paragraph 520 of the Judgment, the Trial Chamber stated:

> Finally, the Trial Chamber has given credit to the Accused for the extent to which his Counsel co-operated with it and with the Prosecution in the efficient conduct of the trial. Counsel were careful not to compromise their obligations to the Accused, but the restriction of the issues which they raised to those issues which were genuinely in dispute enabled the Trial Chamber to complete the trial in much less time than it would otherwise have taken.[418]

262. The Appeals Chamber finds that the conduct described in that paragraph of the impugned Judgment is how any counsel should ordinarily behave before a Trial Chamber. The Appeals Chamber therefore considers that the Trial Chamber erred by giving credit to the Accused for his counsel's conduct. In light of this error, the Appeals Chamber concludes that, as already stated, the conduct of counsel for Krnojelac must not be taken into account in deciding the sentence to be imposed in respect of the new convictions on appeal.

263. The Appeals Chamber will now decide the sentence in respect of the new convictions on appeal. The Prosecution requests that if the Appeals Chamber reverses one or more of the acquittals, the sentence be increased commensurately.[419] It submits that it is possible for the Appeals Chamber to revise the sentence itself rather than remit the matter to the Trial Chamber.[420] Krnojelac does not challenge this and the Appeals Chamber accepts it.

264. Having duly taken into consideration the gravity of the crimes and Krnojelac's responsibility as established by the Trial Chamber and having regard to Krnojelac's liability based on the new convictions on appeal, the Appeals Chamber concludes, in the exercise of its discretion and in light of the mitigating and aggravating circumstances, that the new sentence to be imposed must be a single sentence of 15 years' imprisonment.

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417 Prosecution Brief, para. 9.14, emphasis in original text.
418 Footnotes omitted.
419 Prosecution Brief, para. 9.27.
420 Prosecution Brief, para. 9.28.

PURL: https://www.legal-tools.org/doc/46d2e5/

VI. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT to Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the parties and the arguments they presented at the hearing of 14 and 15 May 2003;

SITTING in open session;

ALLOWS the Prosecution's first ground of appeal and **SETS ASIDE** Krnojelac's convictions as an aider and abettor to persecution (crime against humanity, for imprisonment and inhumane acts) and cruel treatment (violation of the laws or customs of war for the living conditions imposed) under counts 1 and 15 of the Indictment pursuant to Article 7(1) of the Statute;

ALLOWS the Prosecution's third ground of appeal and **REVERSES** Krnojelac's acquittal on counts 2 and 4 of the Indictment (torture as a crime against humanity and a violation of the laws or customs of war) pursuant to Article 7(3) of the Statute;

ALLOWS the Prosecution's fourth ground of appeal and **REVERSES** Krnojelac's acquittal on counts 8 and 10 of the Indictment (murder as a crime against humanity and murder as a violation of the laws or customs of war) pursuant to Article 7(3) of the Statute;

ALLOWS the Prosecution's fifth ground of appeal seeking revision of Krnojelac's conviction under count 1 of the Indictment (persecution as a crime against humanity) pursuant to Article 7(3) of the Statute so that it encompasses a number of beatings;[421]

ALLOWS the Prosecution's sixth ground of appeal and **REVERSES** Krnojelac's acquittal on count 1 of the Indictment (persecution as a crime against humanity) based on the forced labour imposed upon the non-Serb detainees;

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[421] The effects of the Appeals Chamber allowing the Prosecution's fifth ground of appeal are set out in the seventh paragraph on page 114 of this Judgement.

PURL: https://www.legal-tools.org/doc/46d2e5/

ALLOWS the Prosecution's seventh ground of appeal and **REVERSES** Krnojelac's acquittal on count 1 of the Indictment (persecution as a crime against humanity) based on the deportation and expulsion of non-Serb detainees;

DISMISSES the Prosecution's second ground of appeal on the form of the Indictment;

DISMISSES all of Krnojelac's grounds of appeal;

FINDS Krnojelac guilty of counts 1 and 15 of the Indictment as a co-perpetrator of persecution, a crime against humanity (imprisonment and inhumane acts), and of cruel treatment, a violation of the laws or customs of war (living conditions), pursuant to Article 7(1) of the Statute;

FINDS Krnojelac guilty of counts 2 and 4 of the Indictment (torture as a crime against humanity and a violation of the laws or customs of war) pursuant to Article 7(3) of the Statute for the following facts: paragraphs 5.21 (FWS-73), 5.23 (except for FWS-03),[422] 5.27 (Nurko Nisić and Zulfo Veiz), 5.28 and 5.29 (Aziz Šahinović) of the Indictment and the facts described under points B4, B14, B22, B31, B52 and B57 of Schedule C of the Indictment;

FINDS Krnojelac guilty of counts 8 and 10 of the Indictment (murder as a crime against humanity and murder as a violation of the laws or customs of war) pursuant to Article 7(3) of the Statute;

REVISES Krnojelac's conviction under count 1 of the Indictment (persecution as a crime against humanity) pursuant to Article 7(3) so that it encompasses the beatings described in paragraphs 5.9, 5.16, 5.18, 5.20, 5.21 (FWS-110, FWS-144, Muhamed Lisica and several other unidentified detainees), 5.27 (Salem Bičo) and 5.29 (Vahida Džemal, Enes Uzunović and Elvedin Čedić) of the Indictment and in the facts corresponding to numbers A2, A7, A10, A12, B15, B17, B18, B19, B20, B21, B25, B26, B28, B30, B33, B34, B37, B45, B46, B48, B51 and B59 of Schedule C of the Indictment;

FINDS Krnojelac guilty of count 1 of the Indictment as a co-perpetrator of the crime against humanity of persecution (forced labour, deportation and expulsion) pursuant to Article 7(1) of the Statute;

SETS ASIDE all the convictions entered under count 5 of the Indictment (inhumane acts as a crime against humanity) pursuant to Article 7(3) of the Statute and the convictions entered under count 7 of the Indictment (cruel treatment as a violation of the laws or customs of war) pursuant to Article

[422] The Trial Chamber found Krnojelac guilty of persecution as a crime against humanity pursuant to Article 7(3) of the Statute based on the beatings inflicted upon FWS-03. See footnotes 1590 and 1591 of the Judgment.

PURL: https://www.legal-tools.org/doc/46d2e5/

7(3) of the Statute for the following facts: paragraphs 5.21 (FWS-73), 5.23, 5.27 (Nurko Nisić and Zulfo Veiz), 5.28 and 5.29 (Aziz Šahinović) of the Indictment and the facts described under points B4, B14, B22, B31, B52 and B57 of Schedule C of the Indictment;[423]

DISMISSES the sentencing appeals entered by Krnojelac and the Prosecution (with the exception of the sub-ground allowed in paragraph 262 of this Judgement) and **IMPOSES** a new sentence, taking account of Krnojelac's responsibility established on the basis of the new convictions on appeal and in the exercise of its discretion;

SENTENCES Krnojelac to 15 years' imprisonment to run as of this day, subject to credit being given under Rule 101(C) of the Rules for the period Krnojelac has already spent in detention, that is from 15 June 1998 to the present day.

Done in French and English, the French text being authoritative.

Judge Claude Jorda Presiding	Judge Wolfgang Schomburg	Judge Mohamed Shahabuddeen

Judge Mehmet Güney	Judge Carmel Agius

Judges Schomburg and Shahabuddeen each append a Separate Opinion to this Judgement.

Done this seventeenth day of September 2003

At The Hague

The Netherlands

[Seal of the Tribunal]

[423] On the ground that there would be unacceptable multiple convictions if the Accused were to be found guilty of these counts. See paragraphs 172 and 188 of this Judgement.

PURL: https://www.legal-tools.org/doc/46d2e5/

SEPARATE OPINION OF JUDGE SCHOMBURG

1. I agree with the conclusions reached by the Appeals Chamber, but not with certain reasons given in the Judgement. From the outset, a more holistic approach as to the assessment of the facts and the individual criminal responsibility would be preferable. A Judgement should be more elaborate on the reasons as to how a Chamber comes to the proportional sentence, with which I agree. However, I feel it is only necessary to add my observations on the approach taken with regard to the Prosecution's seventh ground of appeal, *i.e.* persecution by way of deportation.

2. The Appeals Chamber should have felt itself obligated to discuss the definition of deportation. As stated in paragraph 6 of the Appeals Judgement,

> [T]he case-law of the *ad hoc* tribunals accepts that there are situations in which the Appeals Chamber can raise questions [even] *proprio motu* or agree to consider alleged errors, which in being dealt with in no way affect the finding but do raise an issue of general significance for the case-law or functioning of the Tribunal.

Further, in paragraph 7 of the Judgement, the Appeals Chamber states:

> The main question is to ensure the development of the Tribunal's case-law and the standardisation of the applicable law. It is appropriate to consider an issue of general interest insofar as the response to that issue would be decisive for the development of the Tribunal's case-law and when at question is an important point of law which deserves examination. The Appeals Chamber must guide the Trial Chambers in their interpretation of the law.

Thus, the primary goal, *nobile officium* and obligation of the Appeals Chamber is to offer guidance to and harmonisation for future decisions by Trial Chambers.

3. I do not believe that it is reasonable for the Appeals Chamber to state that it "is of the view that it is not necessary to express a view, either by affirmation or by way of rejection, on the Trial Chamber's definitions of 'deportation' and 'expulsion'".[1] Similarly, I do not agree with the words used earlier in the Judgement: "[T]he Appeals Chamber does not consider that the main [sic!] issue before it is the definitions of these terms,"[2] as well as "The Appeals Chamber is of the view that it is not necessary, as opposed to what has been submitted by the Prosecutor, to define expulsion as an 'umbrella term that covers acts of forcible displacement, whether internal or cross-border'".[3]

4. It is particularly important for the Appeals Chamber to give guidance when dealing with conduct that has previously been classified both under Article 5(i) of the Statute (other inhumane acts described as "forcible transfer") and under Article 5(d) of the Statute ("deportation"). The

[1] Judgement para. 224.
[2] Judgement para. 210.

PURL: https://www.legal-tools.org/doc/46d2e5/

former approach was taken in the *Krstić* Judgement[4] while the latter approach was adopted in *Stakić*.[5] In both *Krstić* and *Stakić* the acts of "forcible transfer" and "deportation" respectively were also classified as persecution under Article 5(h) of the Statute. In *Blaškić*[6] and *Martinović*,[7] forcible transfer of civilians was characterised as an act of persecution only, while in *Kupreškić*,[8] expulsion of civilians was characterised as persecution. In *Kupreškić* the Trial Chamber stated, *inter alia*:

> In light of the conclusions above, the Trial Chamber finds that the "organised detention and expulsion from Ahmici" of Bosnian Muslim civilians can constitute persecution. This is because these acts qualify as imprisonment, and deportation, which are explicitly mentioned in the Statute under Article 5.[9]

5. In the case before this Appeals Chamber, the Trial Chamber defined deportation as "[t]he forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law".[10] The Trial Chamber went on to state: "Deportation requires the displacement of persons across a national border, to be distinguished from forcible transfer which may take place within national boundaries."[11] However, the Trial Chamber declined to describe forcible transfer in more detail because the criminal conduct was not charged as such in the Indictment.[12]

6. This brief overview already warrants a clear authoritative opinion by the Appeals Chamber.

7. Moreover, the Prosecution concentrated on the crime of deportation in its Brief and oral arguments, arguing that deportation "should be viewed as an umbrella term that covers acts of forcible displacement, whether internal or cross-border."[13] Notably, the focus of its oral arguments on the seventh ground of appeal was on the "first limb" as follows:

> [T]he Trial Chamber erred in law in holding that the acts of forcible displacement charged as persecution require proof that the victims were forcibly displaced across a national border and

[3] Judgement para. 217.
[4] *Krstić* Trial Judgement, paras 520-532, 537-538.
[5] *Stakić* Trial Judgement, paras 671-724.
[6] *Blaškić* Trial Judgement, paras 75-130, 218, 234, 366, 380, 575, 631.
[7] *Naletilić and Martinović* Trial Judgement, paras 512-571, 669-672.
[8] *Kupreškić* Trial Judgement, paras 628-631.
[9] *Kupreškić* Trial Judgement, para. 629.
[10] *Krnojelac* Trial Judgement, para. 474.
[11] *Ibid*.
[12] *Krnojelac* Trial Judgement, para. 476.
[13] Prosecution Brief, 5 August 2002, para. 8.7. *C.f.* para. 217 of the Judgement.

PURL: https://www.legal-tools.org/doc/46d2e5/

> that deportation is to be distinguished from forcible transfer which may take place within national boundaries.[14]

Prosecution counsel argued that the terms "deportation" and "forcible transfer" were synonymous,[15] and stated:

> The Appeals Chamber must seize this opportunity to try and resolve this issue, because even at the trial level, the position is still unclear.[16]

8. In my opinion, the Appeals Chamber should have met this challenge in order

– to enable the Prosecution to plead as concretely as possible,

– to allow the Defence to better understand the elements of the charges against the accused and thereby assisting in a proper defence,

– to guide any future judgements or 98 *bis* decisions,

and in doing so avoiding unnecessary appeals.

9. The Judgement fails to analyse the Trial Chamber's reasoning in deciding not to convict Krnojelac of persecution committed by acts of "deportation and expulsion"[17], and it fails to explain why the Trial Chamber erred in law. This aspect of the Appeals Judgement is not convincing against what is a consistent and systematic argumentation, albeit incorrect, in the Trial Judgement. Krnojelac is charged in the Indictment with deportation and expulsion (and/or "transfer"[18]). The Trial Chamber starts by asking the logical question whether deportation was committed, to which the answer is found to be no. Since "forcible transfer" is not pleaded, the Trial Chamber takes the view that it "cannot consider that offence as founding a charge of persecution".[19] It is therefore difficult to see how the Appeals Chamber can reach the conclusion that "forced displacements" occurred, without discussing the correctness of the approach taken by the Trial Chamber.

10. The Statute of the International Criminal Court has a single category of "deportation or forcible transfer of population"[20] which is defined as the "forced displacement of the persons

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[14] 14 May 2003, T.85.
[15] 14 May 2003, T.89.
[16] 14 May 2003, T.89.
[17] Indictment, para. 5.2(f).
[18] Para. 5.2(f) and related paragraphs of the Indictment. The Indictment refers to "deportation *or* transfer to Montenegro" and states that detainees in the KP Dom were "deported *and* transferred to unknown places". Emphasis added.
[19] *Krnojelac* Trial Judgement, para. 476.
[20] Rome Statute of the International Criminal Court of 17 July 1998, Article 7(1)d: http://www.un.or/law/icc/statute/99_corr/cstatute.htm

PURL: https://www.legal-tools.org/doc/46d2e5/

concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law".[21] While this is not the law of this Tribunal, it demonstrates the confusion that could be caused by identifying a new category of "forced displacements" without considering its relationship to deportation, expulsion and forcible transfer.

11. In deciding whether or not persecution was committed by way of the acts alleged, I would favour a systematic approach where the first stage would be to consider whether one of the offences listed under Article 5 of the Statute was committed. Thus, the crime of "deportation" (English version of the Statute) or "expulsion" (misleading French version of the Statute) would need to be discussed and defined, this being a question of *lex specialis*. If it were concluded that the facts did not support a conviction under deportation/expulsion, then the second stage would be to consider whether an offence of the same gravity as one of the other offences listed in Article 5 had been committed.

12. I agree with the Appeals Chamber's analysis in paragraphs 218, 221 - 223 and 229. Already this analysis allows for the term "forced displacement" to be replaced by the term "deportation" in the sense of Article 5 (d) of the Statute.

13. Adopting a grammatical/literal interpretation of the word "deportation" as a first stage whereby the literal meaning of the word and its roots define the limits of its interpretation, d e portation / e x pulsion is "the act or an instance of removing a person to another country; esp., the expulsion or transfer of an alien from a country".[22] Thus, under Roman law, the term *deportatio* referred to instances where persons were dislocated from one area to another area also under the control of the Roman Empire. A cross-border requirement was consequently not envisaged. Expressed in these terms, the concept of d e portation seems to mean (1) the removal of someone from the territory over which the person removing others exercises (sovereign) authority or, (2) to remove someone from the territory where the person being removed could receive the "protection" of the authority of that territory. The core aspect of deportation is twofold: (1) to take someone out of the place where he or she was lawfully staying, *and* (2) to remove that person from the protection of the authority concerned.[23]

14. The second stage is to determine the meaning of deportation in the specific context in which it is used, having reference to the intention of the authors of the Statute:

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[21] *Ibid.,* Article 7(2)(d).
[22] Blacks Law Dictionary, 7th ed, p. 450.
[23] See for further details, A. Berger, Encyclopaedic Dictionary of Roman Law 432 (1953), as quoted in Blacks Law Dictionary, 7th ed, p. 450.

PURL: https://www.legal-tools.org/doc/46d2e5/

> Interpretation, as applied to written law, is the art or process of discovering and expounding the intended signification of the language used, that is, the meaning which the authors of the law designed it to convey to others.[24]

I do not believe that it is necessary to decide whether deportation has the same meaning under the Geneva Conventions and under Article 5 of the Statute. In his report pursuant to Security Council resolution 808, the Secretary-General noted in relation to Article 5 of the Statute that:

> Crimes against humanity were first recognized in the Charter and Judgement of the Nürnberg Tribunal, as well as in Law No. 10 of the Control Council for Germany. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.[25]

The report continues:

> Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called "ethnic cleansing" and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.[26]

The Tribunal was established, *inter alia*, to hold criminally responsible those persons in the former Yugoslavia who had committed "ethnic cleansing" irrespective of the location of particular borders. The main point is that the underlying conduct[27] was already punishable under public international law at the time the acts were committed. This same view was also taken in the aforementioned Trial Chamber decisions[28] and is accepted by the Appeals Chamber.[29]

15. In my view, the *actus reus* of deportation is forcibly removing or uprooting individuals from the territory and the environment in which they are lawfully present. A fixed destination is not required.

> …Article 5(d) of the Statute must be read to encompass forced population displacements both across internationally recognised borders and *de facto* boundaries, such as constantly changing frontlines, which are not internationally recognised. The crime of deportation in this context is therefore to be defined as the forced displacement of persons by expulsion or other coercive acts for reasons not permitted under international law from an area in which they are lawfully present to an area under the control of another party.[30]

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[24] Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* 1 (1896), as quoted in Blacks Law Dictionary, 7th ed, p. 824.
[25] Report of the Secretary-General pursuant to Paragraph 2 of Security Council resolution 808 (1993), UNSC, UN Doc. S/25704 (1993), para. 47.
[26] Report of the Secretary-General pursuant to Paragraph 2 of Security Council resolution 808 (1993), UNSC, UN Doc. S/25704 (1993), para. 48.
[27] Of course not necessarily under the same norm of a written code of criminal law.
[28] See *supra* para. 4.
[29] Judgement, paras 221-223 and footnote 355.
[30] *Stakić* Trial Judgement, para. 679.

PURL: https://www.legal-tools.org/doc/46d2e5/

The question of whether a border is internationally recognised or merely de facto is immaterial. This was also the approach taken by the International Military Tribunal at Nuremberg[31] and the District Court of Jerusalem in the case of *Attorney General v. Adolf Eichmann*[32].

16. The *mens rea* for deportation is the intent to remove the victim, which implies the intention that the victim can or will not return.

17. While I concur with the conclusion of the Appeals Chamber that the acts classified by the Appeals Chamber as forcible displacement amount to persecution, I would define the underlying conduct as deportation. Therefore, the question of the acts being of the same level of gravity as the other crimes listed in Article 5 of the Statute does not arise.

Done in English and French, the English text being authoritative.

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Judge Wolfgang Schomburg

Dated this seventeenth day of September 2003
At The Hague
The Netherlands

[Seal of the Tribunal]

[31] International Military Tribunal, The Trial of German Major War Criminals, Judgement: 30 September 1946 – 1 October 1946, p. 65.

[32] *Attorney-General v Adolf Eichmann*, District Court of Jerusalem, Case No. 40/61, paras 200-206.

PURL: https://www.legal-tools.org/doc/46d2e5/

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. I agree with the judgment of the Appeals Chamber. In support, I propose to speak separately on (a) the avoidance in the judgment of any remarks on deportation, (b) the gravity of a crime of persecution, and (c) whether there was a genuine possibility of consent to work or to be relocated.

A. Deportation

2. On the question of the meaning of "deportation" as it is used in article 2(g) and in article 5(d) of the Statute, I accept that there can be cases in which the general importance of a view expressed by the Trial Chamber can warrant an expression of opinion by the Appeals Chamber even if the point is not relevant to the determination of the appeal. But the competence is obviously not to be freely exercised; whether it will be exercised is a matter of degree of linkage and of discretion, as sought to be explained below.

3. As to the degree of linkage, even if the point is not relevant to the determination of the appeal, there has to be a connection between it and the issues which are relevant to the determination of the appeal. In this case, the issues which are relevant to the determination of the appeal arise on the indictment. There is not any connection between the indictment, as it is understood by the Appeals Chamber, and the references to "deportation" in article 2(g) and in article 5(d) of the Statute.

4. As to discretion, the matter admits of different views and may soon arise in other appeals; therefore, it may be better left for determination in other appeal proceedings. Meanwhile, it cannot be said that the Appeals Chamber is by default approving of the views of the Trial Chamber; in paragraph 224 of its judgment, the Appeals Chamber has made it clear that it is expressing no views either by way of affirmation or by way of rejection of the definition given by Trial Chamber.

B. The gravity of a crime of persecution

5. The general view is that an act could only ground a charge of a crime against humanity committed through persecution if the act was itself a crime enumerated in article 5(a) to (g) of the Statute ("enumerated crimes") or if, not being such a crime, it attained a gravity comparable to that

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of an enumerated crime. This basis, for which authority could be found,[1] needs care in its application.

6. Article 5 of the Statute deals with crimes against humanity committed through certain supporting crimes. Under paragraph (h) of the provision, the relevant supporting crime is "persecution", the underlying act or acts being only evidence of the persecution. It is the "persecution" which must have the same gravity as that of enumerated crimes. The underlying act does not have to be a crime listed in article 5 of the Statute. It does not have to be a crime specified elsewhere in the Statute. Indeed, by itself it does not have to be a crime specified anywhere in international criminal law: it may be a non-crime. As was recalled in the *Ministries Case*:[2]

> The persecution of Jews went on steadily from step to step and finally to death in foul form. The Jews of Germany were first deprived of the rights of citizenship. They were then deprived of the right to teach, to practice professions, to obtain education, to engage in business enterprises, they were forbidden to marry except among themselves and those of their own religion; they were subject to arrest and confinement in concentration camps, to beatings, mutilation, and torture; their property was confiscated; they were herded into ghettos; they were forced to emigrate and to buy leave to do so; they were deported to the East, where they were worked to exhaustion and death; they became slave laborers; and finally over six million were murdered.

Citing that case, the *Kvočka* Trial Chamber later said:

> [J]urisprudence from World War II trials found acts or omissions such as denying bank accounts, educational or employment opportunities, or choice of spouse to Jews on the basis of their religion, constitute persecution. Thus, acts that are not inherently criminal may nonetheless become criminal and persecutorial if committed with discriminatory intent.[3]

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[1] For general discussion see *Tadić*, IT-94-1-T, of 7 May 1997, paras. 699-710; *Kupreškić*, IT-95-16-T, of 14 January 2000, paras. 616-627; and *Kordić and Čerkez*, IT-95-14/2- T, 26 February 2001, paras. 191-199.
[2] *U.S. v. Ernst von Weizsaecker*, Trials of War Criminals before the Nuerenberg Military Tribunals under Control Council Law No. 10, Vol. XIV, p. 471.
[3] IT-98-30/1-T, of 2 November 2001, para. 186.

PURL: https://www.legal-tools.org/doc/46d2e5/

7. It follows that an underlying act may not by itself constitute a crime; therefore, there can be no question of its having the same gravity as an enumerated crime. But the act, taken separately or cumulatively with other acts, can give rise to the crime of persecution. The question which then arises is what is the level of persecution that the Statute is concerned with. It is possible that there can be persecution at different levels. It is here, I think, that it would be reasonable to say that the Statute is concerned only with cases in which the level of the gravity of the proven persecution matches the level of the gravity of an enumerated crime.

C. Whether there was a possibility of genuine consent

8. Consent is a matter of will. *Milch*[4] shows that the use of a conventional labour contract can be a fictitious method of disguising the absence of real consent to work. In the trial of the major war criminals at Nuremberg, the International Military Tribunal pointed out that even the fact that workers might theoretically be allowed to transfer their savings to their own country does not necessarily show consent.[5] The issue whether there is consent might arise in various settings. The *Kunarac*[6] Trial Chamber correctly held that in certain circumstances even the fact that a woman initiated sex does not necessarily imply consent. The circumstances of a particular case have to be considered to determine whether it was at all possible for consent to be given in that case.

9. The circumstances of this case have been recalled in paragraphs 193-194 of the judgment of the Appeals Chamber and elsewhere in it. There were many vacant cells in KP Dom; yet the non-Serb detainees were heaped into crowded cells, each of which was designed to accommodate one prisoner in solitary confinement but which now held up to 18 detainees, without the possibility of lying down and with little hygiene. There was no provision for warmth even during a severe winter, and detainees were forbidden to make any necessary extra clothing. They were given bare survival food; they lost weight, between 20 and 40 kilos per detainee. They were generally required to stay in their cells, sometimes placed in isolation for small infractions. There were frequent beatings; the cries and moans of those being beaten could be heard. There was torture. Fresh bloodstains were visible. Detainees knew that colleagues were taken out never to return – that they were made to "disappear". There was evidence that detainees had been killed on the

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[4] II TWC 359 at 789.

[5] Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946 (Nuremberg, 1947), Vol. 1, p. 246.

[6] IT-96-23-T & IT-96-23-/1-T, of 22 February 2001, paras. 644-645. See also the appeal judgment in IT-96-23 & IT-96-23/1-A, of 12 June 2002, para. 133, agreeing "with the Trial Chamber's determination that the coercive circumstances present in this case made consent to the instant sexual acts by the Appellants impossible"; see also, para. 218.

PURL: https://www.legal-tools.org/doc/46d2e5/

premises; surviving detainees knew this. The atmosphere was one of violence and fear; the climate was oppressive; detainees were vulnerable; the situation was inhuman.

10. In such circumstances, it is difficult to appreciate what more the prosecution could be asked to show in discharge of its burden to prove that there was no possibility of genuine consent to work or to be relocated. The fact that some detainees were eager for the opportunity to go out of KP Dom to work or to be relocated has been dealt with in the judgment. That does not show that there was a possibility of genuine consent; on the contrary, it is only evidence of the consequence of the absence of any possibility of genuine consent.

11. It is written that, on a question of fact (such as whether there was consent), the Appeals Chamber will only intervene if the finding of the Trial Chamber was one which no reasonable tribunal of fact could have made. That is a healthy caution against appellate intervention propelled by inadmissible considerations. But, wholesome as is the admonition, it does not extend so far as to require the upholding of a conclusion issuing from a course of reasoning which cannot be reconciled with common sense. The task of the prosecution is rightly heavy; it should not be made unmanageably so.

Done in English and French, the English text being authoritative.

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Mohamed Shahabuddeen

Dated 17 September 2003

At The Hague

The Netherlands

[Seal of the Tribunal]

PURL: https://www.legal-tools.org/doc/46d2e5/

ANNEX A: GLOSSARY

A. Appeal

1. Parties' written submissions

Defence Notice of Appeal	Defence Notice of Appeal, filed on 12 April 2002
Prosecution Notice of Appeal	Prosecution's Notice of Appeal, filed on 15 April 2002
Defence Brief	Appeal Brief of the Defence, filed on 21 August 2002
Prosecution Response	Prosecution Respondent's Brief, filed on 30 September 2002
Prosecution Brief	Appeal Brief of the Prosecution, filed on 5 August 2002
Defence Response	Defence Respondent's Brief, filed on 25 September 2002
Prosecution Reply	Prosecution Brief in Reply, filed on 10 October 2002

2. References used in this case

Indictment	Third Amended Indictment in *The Prosecutor v. Milorad Krnojelac*, case no. IT-97-25, 25 June 2001
Hearings on Appeal	Hearings of the parties' arguments on appeal, 14 and 15 May 2003
Common Article 3	Article 3 common to the four Geneva Conventions of 1949
Bosnia and Herzegovina	Republic of Bosnia and Herzegovina

PURL: https://www.legal-tools.org/doc/46d2e5/

Trial Chamber	Trial Chamber II of the International Tribunal
Appeals Chamber	Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
ICRC	International Committee of the Red Cross
T	Transcript of the trial hearings in the case *The Prosecutor v. Milorad Krnojelac*, case no. IT-97-25-T
T(A)	Transcript of the hearings on appeal held at The Hague (hearings of 14 and 15 May 2003). All the page numbers of the transcripts mentioned in this Judgement refer to the English transcript.
Defence	Defence for Milorad Krnojelac
Trial Judgment or Judgment	*The Prosecutor v. Milorad Krnojelac*, case no. IT-97-25-T, Judgment, 15 March 2002
Pre-Trial Brief	Prosecutor's Pre-Trial Brief, filed on 16 October 2000
Prosecutor or Prosecution	Office of the Prosecutor
Rules	Rules of Procedure and Evidence of the Tribunal
Krnojelac	Milorad Krnojelac

PURL: https://www.legal-tools.org/doc/46d2e5/

B. Case-law cited

Akayesu Appeals Judgement

Judgement, *The Prosecutor v. Jean-Paul Akayesu*, case no. ICTR-96-4-A, 1 June 2001 (ICTR Appeals Chamber)

Aleksovski Appeals Judgement

Judgement, *The Prosecutor v. Zlatko Aleksovski*, case no. IT-95-14/1-A, 24 March 2000 (Appeals Chamber)

Bagilishema Appeals Judgement

Judgement (Reasons), *The Prosecutor v. Ignace Bagilishema*, case no. ICTR-95-1A-A, 13 December 2002 (ICTR Appeals Chamber)

Čelebići Appeals Judgement

Judgement, *The Prosecutor v. Zejnil Delalić et al.*, case no. IT-96-21-A, 20 February 2001 (Appeals Chamber)

Erdemović Appeals Judgement

Judgement, *The Prosecutor v. Dražen Erdemović*, case no. IT-96-22-A, 7 October 1997 (Appeals Chamber)

Furundžija Appeals Judgement

Judgement, *The Prosecutor v. Anto Furundžija*, case no. IT-95-17/1-A, 21 July 2000 (Appeals Chamber)

Jelisić Appeals Judgement

Judgement, *The Prosecutor v. Goran Jelisić*, case no. IT-95-10-A, 5 July 2001 (Appeals Chamber)

Kambanda Appeals Judgement

Judgement, *The Prosecutor v. Jean Kambanda*, case no. ICTR-97-23-A, 19 October 2000 (ICTR Appeals Chamber)

Kayishema/Ruzindana Appeals Judgement or *Kayishema and Ruzindana* Appeals Judgement

Judgement (Reasons), *Clément Kayishema and Obed Ruzindana v. The Prosecutor*, case no. ICTR-95-1-A, 1 June 2001 (ICTR Appeals Chamber)

Kunarac Appeals Judgement

Judgement, *The Prosecutor v. Dragoljub Kunarac et al.*,

PURL: https://www.legal-tools.org/doc/46d2e5/

	case no. IT-96-23 & IT-96-23/1-A, 12 June 2002 (Appeals Chamber)
Kupreškić Appeals Judgement	Appeal Judgement, *The Prosecutor v. Zoran Kupreškić et al.*, case no. IT-95-16-A, 23 October 2001 (Appeals Chamber)
Musema Appeals Judgement	Judgement, *Alfred Musema v. The Prosecutor*, case no. ICTR-96-13-A, 16 November 2001 (ICTR Appeals Chamber)
Rutaganda Appeals Judgement	Appeals Judgement, *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, case no. ICTR-96-3-A, 26 May 2003 (ICTR Appeals Chamber)
Serushago Appeals Judgement	Reasons for Judgement, *Omar Serushago v. The Prosecutor*, case no. ICTR-98-39-A, 6 April 2000 (ICTR Appeals Chamber)
Tadić Appeals Judgement	Judgement, *The Prosecutor v. Duško Tadić,* case no. IT-94-1-A, 15 July 1999 (Appeals Chamber)
Tadić Appeals Judgement (Allegations of contempt)	Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, *The Prosecutor v. Duško Tadić*, case no. IT-94-1-A-R72, 31 January 2000 (Appeals Chamber)
Tadić Decision (Jurisdiction)	Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor v. Duško Tadić*, case no. IT-94-1- AR72, 2 October 1995 (Appeals Chamber)

PURL: https://www.legal-tools.org/doc/46d2e5/

Tadić Decision (Additional Evidence)	Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, *The Prosecutor v. Duško Tadić*, case no. IT-94-1-A, 15 October 1998 (Appeals Chamber)
Akayesu Judgement	Judgement, *The Prosecutor v. Jean-Paul Akayesu*, case no. ICTR-96-4-T, 2 September 1998 (ICTR Trial Chamber)
Blaškić Judgement	Judgement*, The Prosecutor v. Tihomir Blaškić,* case no. IT-95-14-T, 3 March 2000 (Trial Chamber)
Čelebići Judgement	Judgement, *The Prosecutor v. Zejnil Delalić et al.*, case no. IT-96-21-T, 16 November 1998 (Trial Chamber)
Kayishema and Ruzindana Judgement	Judgement and Sentence, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, case no. ICTR-95-1-T, 21 May 1999 (ICTR Trial Chamber)
Elizaphan and Gérard Ntakirutimana Judgement	Judgement and Sentence, *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, case no. ICTR-96-10 & ICTR-96-17-T, 21 February 2003 (Trial Chamber)
Naletilić and Martinović Judgement	Judgement, *The Prosecutor v. Mladen Naletilić and Vinko Martinović,* case no. IT-98-34-T (Trial Chamber)
Krstić Judgement	Judgement, *The Prosecutor v. Radislav Krstić,* case no. IT-98-33-T, 2 August 2001 (Trial Chamber)
Tadić Judgment	Opinion and Judgment, *The Prosecutor v. Duško Tadić,* case no. IT-94-1-T, 7 May 1997 (Trial Chamber)
Plavšić Judgement	Sentencing Judgement, *The Prosecutor v. Biljana Plavšić*, case no. IT-00-39&40/I-S, 27 February 2003

PURL: https://www.legal-tools.org/doc/46d2e5/

Ojdanić Decision	Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, *The Prosecutor v. Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, case no. IT-99-37-AR72, 21 May 2003 (Appeals Chamber)

C. Other references

Fourth Convention	Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, International Committee of the Red Cross, 12 August 1949
Commentary on the Additional Protocols	Sandoz et al. (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC, Geneva 1986
Registrar	Registrar of the ICTY
KP Dom	Foča Penal and Correctional Facility (*Kazneno-Popravni Dom*)
Secretary-General's Report	Report of the Secretary-General Pursuant to Paragraph 2 of Security Council resolution 808 (1993), UN Doc S/25704, 3 May 1993
Rules	Rules of Procedure and Evidence of the Tribunal
Statute	Statute of the International Tribunal
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious

PURL: https://www.legal-tools.org/doc/46d2e5/

	Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
International Tribunal or Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
Rome Statute	Statute of the International Criminal Court adopted in Rome on 17 July 1998, PCNICC/1999/INF.3

PURL: https://www.legal-tools.org/doc/46d2e5/

ANNEX B: PROCEDURAL BACKGROUND

265. The main aspects of the appeal proceedings are summarised below.

266. Krnojelac and the Prosecution filed their Notices of Appeal on 12 and 15 April 2002 respectively. On 19 April 2002 the President of the Tribunal, Judge Jorda, issued an order assigning the following judges to the Appeals Chamber: Judge Shahabuddeen (presiding), Judge Güney, Judge Gunawardana, Judge Pocar and Judge Meron.[424] On 6 May 2002 the President of the Appeals Chamber designated Judge Meron as the Pre-Appeal Judge ("PAJ") in this case.[425]

267. On 7 May 2002 the PAJ requested that Krnojelac file a new Notice of Appeal respecting the presentation criteria set forth in Rule 108 of the Rules and Article 1 of the Practice Direction.[426] The Appeals Chamber referred only to this new Notice of Appeal, filed on 21 May 2002.[427] On 20 June 2002, the PAJ granted the Defence's request for an extension of time to file its Appeal Brief and, similarly, granted the Prosecution an extension of time to file its Appeal Brief.[428] Pursuant to Rule 65bis(B) of the Rules, the PAJ ordered that a status conference be held on 31 July 2002.[429] On 16 July 2002 the PAJ again granted the parties additional time to file Appeal Briefs.[430] Furthermore, on 16 July 2002, the PAJ gave the Prosecution leave to file an Appeal Brief exceeding the page limit prescribed by the Practice Direction and allowed it to file a brief not exceeding 130 pages.[431]

268. The Prosecution filed a confidential version of its Appeal Brief on 5 August 2002.[432] However, on 9 August 2002, the PAJ asked the Prosecution to file a public version of the brief, which was done on 22 August 2002.[433] On 21 August 2002 the Defence also filed its Appeal Brief.[434] On 16 September 2002 the PAJ granted the Defence's request for an extension of time to file its Defence Respondent's Brief, which was ultimately filed on 25 September 2002.[435] On 29

[424] Order of the President Assigning Judges to the Appeals Chamber, 19 April 2002.
[425] Order Designating a Pre-Appeal Judge, 6 May 2002.
[426] Order on the Form of the Defence Notice of Appeal, 7 May 2002.
[427] Defence Re-filed Notice of Appeal, 21 May 2002.
[428] Decision on Requests for Extension of Time , 20 June 2002.
[429] Scheduling Order, 20 June 2002.
[430] Decision on Further Requests for Extension of Time, 16 July 2002.
[431] Decision on Prosecution's Request for Authorization to Exceed Prescribed Page Limits, 26 July 2002.
[432] OTP Appellant's Brief (confidential), 5 August 2002.
[433] Order on the Filing of the Public Version of the Appellate Documents, 9 August 2002 and Public Redacted Version of Appeal Brief of the Prosecution, 22 August 2002.
[434] Appeal Brief of the Defence, 21 August 2002.
[435] Decision on Request for Extension of Time, 16 September 2002, and Defence Respondent's Brief, 25 September 2002.

PURL: https://www.legal-tools.org/doc/46d2e5/

October 2002 the Prosecution filed a public version of its Respondent's Brief[436] as well as a public version of its Brief in Reply.[437] On 12 November 2002 the PAJ ordered that a status conference be held on 27 November 2002.[438]

269. On 14 November 2002 the Defence filed a request for the provisional release of Krnojelac on account of his brother's ill health.[439] The Appeals Chamber granted this request and allowed Krnojelac five (5) days' provisional release in Foča (Bosnia and Herzegovina).[440]

270. On 14 March 2003 the Defence notified the Appeals Chamber of its intention to file a motion to admit additional evidence on appeal pursuant to Rule 115 of the Rules.[441] However, on 31 March 2003, it informed the Appeals Chamber that it would not be submitting such a motion.[442]

271. By order dated 17 March 2003, the newly-elected President of the Tribunal, Judge Meron, assigned Judge Jorda to this case to replace Judge Pocar.[443] By order dated 18 March 2003, the President of the Tribunal assigned Judge Güney to replace him as the Pre-Appeal Judge.[444] A status conference was held on 3 April 2003.[445] By order dated 29 April 2003, the President of the Tribunal assigned Judges Wolfgang Schomburg and Carmel Agius to replace Judges Meron and Asoka de Zoysa Gunawardana in this case.[446]

272. By order dated 24 April 2003, Judge Jorda ordered that the hearing on appeal be held on 14 and 15 May 2003 before the Appeals Chamber, which was then composed of Judges Jorda (presiding), Schomburg, Shahabuddeen, Güney and Agius.[447] A status conference was held on 4 July 2003.[448] In a scheduling order dated 9 September 2003, Judge Jorda ordered that a public hearing be held on 17 September 2003 for the Appeals Chamber to deliver its Judgement in this

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[436] Public Redacted Version of Prosecution Respondent's Brief, 29 October 2002. A confidential version of this document was filed on 30 September 2002.
[437] Public Redacted Version of the Prosecution Brief in Reply, 29 October 2002. A confidential version of this document was filed on 10 October 2002.
[438] Scheduling Order, 12 November 2002.
[439] Request for Provisional Release, 14 November 2002.
[440] Decision on Application for Provisional Release, 12 December 2002.
[441] Defence Notice to the Appeals Chamber of Pending Submission of Motion to Admit Additional Evidence Pursuant to Rule 115,14 March 2003.
[442] Defence Notice to the Appeals Chamber of Decision to Waive Right to Submit Motion to Admit Additional Evidence Pursuant to Rule 115, 31 March 2003.
[443] Order Replacing a Judge in a Case before the Appeals Chamber, 17 March 2003.
[444] Order Replacing Pre-Appeal Judge, 18 March 2003.
[445] Scheduling Order, 20 March 2003.
[446] Order Assigning Judges, 29 April 2003.
[447] Scheduling Order for the Hearing on Appeal, 24 April 2003 and Scheduling Order, 7 May 2003.
[448] Scheduling Order, 18 June 2003, scheduling the status conference for 4 July 2003.

PURL: https://www.legal-tools.org/doc/46d2e5/

case.[449] On 15 September 2003 the Prosecution filed a public version of a motion to admit additional evidence on appeal pursuant to Rule 115 of the Rules.[450] By a decision dated 16 September 2003, the Appeals Chamber dismissed this motion.[451]

[449] Scheduling Order, 9 September 2003.

[450] Prosecution's Motion to Admit Additional Evidence Pursuant to Rule 115 and Application for Extension of Time to File Additional Evidence Pursuant to Rule 127, 15 September 2003.

[451] Public Version of the Confidential Decision on Prosecution's Motion to Admit Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence Filed on 11 September 2003, 16 September 2003.

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